Supreme Court, U.S.
FILED

95 1473 MAR 1 4 1996

OFFICE OF THE CLERK

No. ——

In The Supreme Court of the United States

October Term, 1995

Praxair, Inc.,
Petitioner,

v.

Florida Power & Light Company and
Florida Power Corporation,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

PETITION FOR A WRIT OF CERTIORARI

Carter G. Phillips
Sidley & Austin
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 736-8000

Nathan P. Eimer
Constantine L. Trela, Jr.*
David D. Meyer
Sidley & Austin
One First National Plaza
Chicago, Illinois 60603
(312) 853-7000

Counsel for Petitioner

* Counsel of Record

March 14, 1996

Wilson - Epes Printing Co., Inc. - 789-0096 - Washington, D.C. 20001

79 pp

QUESTION PRESENTED

Whether a state agency may retroactively confer antitrust immunity under the state action doctrine upon past private anticompetitive conduct?

LIST OF PARTIES AND AFFILIATES

In addition to the parties listed in the caption, Union Carbide Corporation ("Union Carbide"), a New York corporation, was the original plaintiff in this action. After Union Carbide filed this action, it spun off the assets and business that are at issue here, creating Praxair, Inc. On December 21, 1993, the district court entered an order substituting Praxair for Union Carbide as the party plaintiff, and Praxair is the sole petitioner in this Court.

Pursuant to S. Ct. Rule 29.1, Praxair states that it has no parent company. Its subsidiaries, other than wholly-owned subsidiaries, are:

Altair Gases and Equipment, Inc.
Argon, S.A.
Beijing Praxair, Inc.
Gas Tech, Incorporated
GenEx, Ltd.
Jacksonville Welding Supply, Inc.
Linde de Mexico, S.A. de C.V.
Maxima Air Separation Center Limited
P. T. Praxair Indonesia
Praxair Korea Company Limited
RIVOIRA S.p.A.
Shanghai Praxair Baosteel, Inc.
Wellnite Services

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
LIST OF PARTIES AND AFFILIATES	ii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	2
STATUTE INVOLVED	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE PETITION	11
CONCLUSION	19

TABLE OF AUTHORITIES

CASES Page

Anderson v. *Liberty Lobby, Inc.*, 477 U.S. 242 (1986) 2
California Retail Liquor Dealers Ass'n v. *Midcal Aluminum, Inc.*, 445 U.S. 97 (1980) 8, 9, 14, 16
Cantor v. *Detroit Edison Co.*, 428 U.S. 579 (1976) .. 14
City Gas Co. v. *Peoples Gas Sys., Inc.*, 182 So.2d 429 (Fla. 1965) 3, 9
Columbia Steel Casting Co. v. *Portland Gen. Elec. Co.*, 60 F.3d 1390 (9th Cir. 1995) 11, 12, 13, 15, 18, 19
DFW Metro Line Servs. v. *Southwestern Bell Tel. Corp.*, 988 F.2d 601 (5th Cir.), *cert. denied*, 114 S. Ct. 183 (1993) 17, 18
FTC v. *Ticor Title Ins. Co.*, 504 U.S. 621 (1992) 14, 16, 17
Matsushita Elec. Indus. Corp. v. *Zenith Radio Corp.*, 475 U.S. 574 (1986) 2
Municipal Util. Bd. of Albertville v. *Alabama Power Co.*, 21 F.3d 384 (11th Cir. 1994), *cert. denied*, 115 S. Ct. 1096 (1995) 17, 18
Palmer v. *BRG of Georgia, Inc.*, 498 U.S. 46 (1990) (per curiam) 6
Parker v. *Brown*, 317 U.S. 341 (1943) 13, 14, 15, 18
Patrick v. *Burget*, 486 U.S. 94 (1988) 14, 15, 17
United States v. *Topco Associates, Inc.*, 405 U.S. 596 (1972) 6
Warrior Tombigbee Transp. Co. v. *M/V Nan Fung*, 695 F.2d 1294 (11th Cir. 1983) 10

STATUTES AND RULES

15 U.S.C. § 1 2
28 U.S.C. § 1254 2
Eleventh Circuit Rule 35-6 2

OTHER AUTHORITIES

I Phillip Areeda & Donald F. Turner, *Antitrust Law* ¶ 213 (1978) 18

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

No. ———

PRAXAIR, INC.,

Petitioner,

v.

FLORIDA POWER & LIGHT COMPANY AND
FLORIDA POWER CORPORATION,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

PETITION FOR A WRIT OF CERTIORARI

Petitioner Praxair, Inc. ("Praxair"), respectfully requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals is included in the Appendix at pp. 1a-9a; it is reported at 64 F.3d 609. The order of the court of appeals denying Praxair's petition for rehearing and suggestion of rehearing *en banc* is included in the Appendix at 29a-30a. The opinion and order of the United States District Court for the Middle District of Florida denying the parties' cross-motions for summary judgment is unreported and is included in the Appendix at 10a-28a. The district court's order denying

the parties' cross-motions for reconsideration, which also is unreported, is included in the Appendix at 31a-33a.

JURISDICTION

The court of appeals entered its opinion and judgment in this case on September 19, 1995. Praxair filed a timely suggestion of rehearing *en banc*, which, pursuant to Eleventh Circuit Rule 35-6, was also treated as a petition for rehearing by the panel. The court of appeals denied Praxair's petition for rehearing and suggestion of rehearing *en banc* on December 15, 1995. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254.

STATUTE INVOLVED

Section 1 of the Sherman Antitrust Act makes unlawful "[e]very contract, combination . . . or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations . . . ." 15 U.S.C. § 1.

STATEMENT OF THE CASE

The question in this case is whether a State may retroactively confer immunity from federal antitrust scrutiny upon a purely private agreement to allocate service territories—a private agreement that, at the time of its undertaking and for years thereafter, operated without state approval and constituted a *per se* violation of the Sherman Act. The facts that underlie this question are largely undisputed, although the parties have contested the inferences that should be drawn from these facts. Because the court of appeals directed the entry of summary judgment against petitioner, however, all reasonable inferences must be drawn in petitioner's favor. *See Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986); *Matsushita Elec. Indus. Corp.* v. *Zenith Radio Corp.*, 475 U.S. 574, 587-88 (1986).

1. Electric power in Florida, insofar as is relevant here, is provided by one of two utilities: Florida Power

& Light Company ("FPL") and Florida Power Corporation ("FPC"). As Florida's population boomed in the middle decades of this century, expanding into regions that formerly had been largely undeveloped, the two utilities entered into a series of agreements allocating exclusive service territories between themselves. Rather than divide the State in a single comprehensive agreement, however, the utilities allocated territories in a piecemeal fashion that kept pace with commercial and residential development. In 1958, for example, FPL and FPC agreed upon a territorial division of Volusia and Seminole Counties in east central Florida. Four years later, as development pushed south into Orange and Osceola Counties and the utilities found themselves in competition for newly-developed communities there, FPL and FPC again negotiated a territorial allocation and struck an agreement that eliminated competition between them in the assigned territories.

These 1958 and 1962 pacts were memorialized in private "letter agreements" between the utilities, and the division of territories was indicated by a red line drawn through highway maps of the four affected counties. Under the agreements, FPL was given the exclusive right to sell electric power in eastern Volusia and Seminole Counties, and FPC was given the exclusive right to sell electric power in western Volusia and Seminole Counties, in the entirety of Orange County, and in a portion of Osceola County.

FPL and FPC submitted these territorial agreements to the Florida Public Utilities Commission, now known as the Florida Public Service Commission ("the Commission"), for approval in June 1964. As the court of appeals noted, Florida law permits electric utilities to allocate territories, but requires that such agreements be approved by the Commission. 64 F.3d at 612, App. at 5a; *see also City Gas Co.* v. *Peoples Gas Sys., Inc.*, 182 So.2d 429, 436 (Fla. 1965).

In its application for Commission approval, FPL stated that the territorial division concerned only Volusia, Seminole, Orange, and Osceola Counties and that it left "unresolved" the issue of how to allocate other territories.[1] Consistent with this representation, the Commission docketed the matter under the caption, "In the Matter of Application of Florida Power and Light Company and Florida Power Corporation for approval of a territorial agreement relative to their respective service areas in *Volusia, Seminole, Orange, and Osceola counties*" (emphasis added). Similarly, when the Commission, as it was required to do under Florida law, sent notice of its public hearing on the application to all affected parties, it directed the notice to the governments of only the four named counties. *See* App. 12a. References to the proposed territorial allocation in the notices and in an en-

---

[1] FPL's application described the proposed territorial allocation as follows:

> "[U]nder date of October 28, 1958, the Company [FPL] and Florida Power [FPC] entered into an Agreement constituting an administrative working arrangement whereunder the areas in *Volusia and Seminole Counties* were allocated between the two so that each would have its own service area which it could serve without threat of competition from the other. Under date of September 4, 1962, this agreement was amended so as to extend the original agreement to *Orange and Osceola Counties*. . . .
>
> . . . .
>
> "The Company realizes that th[is] Agreement is not comprehensive in that it leaves unresolved territorial problems which have and may arise between the Company and Florida Power. Applicant, however, alleges that the Agreement is the result of long, arduous, arms-length bargaining and negotiations between two entities and that the Agreement represents the areas and problems which the parties have been able to resolve for the future, which problems are not resolved by existing law."

Application of Florida Power & Light Company for Approval of an Agreement with Florida Power Corporation Relative to Service Areas ¶¶ 12, 14 (June 2, 1964) (RF-149-T4) (emphasis added).

gineering evaluation performed by the Commission consistently described the allocation as establishing utility service boundaries *only* for the counties of "Volusia, Seminole, Orange, and Osceola." *See* Florida Public Util. Comm'n Notice of Hearing (RF-39-88); Memorandum from Florida Public Util. Comm'n Engin. Dep't to Comm'n Exec. Sec'y, at p. 2 (Jan. 9, 1965) (RF-39-91). Following a hearing on the territorial allocation, at which the tendered agreements repeatedly were described as affecting only Volusia, Seminole, Orange, and Osceola Counties, the Commission issued an order on April 28, 1965, approving the territorial division. *See* App. 34a-38a (hereafter, "the 1965 Order").

2. In 1965—the same year in which the Commission approved the utilities' allocation of territory in Volusia, Seminole, Orange, and Osceola Counties—petitioner opened an industrial gas plant in Brevard County, which lies adjacent to and just east of Orange and Osceola Counties.[2] Since that time, Praxair has purchased its electric power solely from FPL.

Over the years, FPL's rates surged sharply higher than FPC's, and Praxair resolved to seek alternative sources of electric power. In August 1988, after FPL refused to negotiate a lower rate, Praxair asked FPC to sell it electric power. FPC, which was capable of delivering electric power to Praxair over existing FPL lines without any capital expenditure—a practice known in the industry as "wheeling"—refused on the grounds that Praxair's Brevard County plant fell within the exclusive service territory assigned by the utilities to FPL. FPL, too, affirmed that it would not deliver or wheel electricity

---

[2] Union Carbide Corporation ("Union Carbide") opened the Brevard County plant and operated it until it created Praxair in 1992. The plant is now owned by Praxair, which on December 21, 1993, formally replaced Union Carbide as plaintiff in this action. For simplicity, Praxair and its predecessor are referred to collectively as "Praxair" throughout this petition.

generated by FPC to Praxair because of the utilities' territorial allocation of Brevard County to FPL.

3. On October 14, 1988, Praxair filed suit in the United States District Court for the Middle District of Florida against both FPL and FPC, alleging that the two had violated section 1 of the Sherman Act by conspiring to restrain trade through their territorial allocation of Brevard County. Virtually simultaneously, FPL asked the Florida Public Service Commission to issue a declaration validating the utilities' territorial allocation of Brevard County. In February 1989, the Commission complied, issuing a declaratory statement in which it construed its 1965 Order as impliedly assigning Brevard County to FPL's exclusive territory. *See In re: Petition of Florida Power and Light Company for a Declaratory Statement Regarding Request for Wheeling,* Order No. 20808, Docket No. 881326-EI (Feb. 24, 1989) (App. 39a-54a).

All parties moved for summary judgment in the district court. FPL and FPC freely acknowledged that they had agreed not to compete in Brevard County and that FPL therefore enjoyed a monopoly in the sale of electric power within the county. There was also no real dispute that this territorial division, in the absence of any valid claim of immunity, would constitute a *per se* violation of the Sherman Act. *See Palmer* v. *BRG of Georgia, Inc.*, 498 U.S. 46, 49 (1990) (per curiam); *United States* v. *Topco Associates, Inc.*, 405 U.S. 596, 608 (1972). Indeed, "[t]his Court has reiterated time and again that '[h]orizontal territorial limitations . . . are naked restraints of trade with no purpose except stifling of competition.'" *Palmer,* 498 U.S. at 49 (quoting *Topco,* 405 U.S. at 608). Because the utilities' sole defense to the Sherman Act claim was that their conduct enjoyed immunity under the state action doctrine, the central question in the case was whether the State had in fact approved the utilities' allocation of Brevard County to FPL. Al-

though the parties agreed that this issue should be decided based upon available documentary evidence, they disagreed over the inferences to be drawn from that evidence.

In support of its motion for summary judgment, Praxair pointed out that the utilities' 1958 and 1962 letter agreements expressly purported to allocate territories only in four named counties—Volusia, Seminole, Orange, and Osceola. The limited nature of this territorial division was confirmed in maps that were appended to the letter agreements to illustrate the negotiated dividing line: the utilities included official county highway maps only for Volusia, Seminole, Orange, and Osceola Counties. Praxair further observed that the Florida Public Service Commission's public notices concerning the utilities' application for approval of these agreements likewise represented that the territorial allocations affected only Volusia, Seminole, Orange, and Osceola Counties. The undisputed evidence further showed that when the Commission sent the required notice of the public hearing on the matter to public officials in affected localities, it sent notices only to officials in Volusia, Seminole, Orange, and Osceola Counties. Thus, as the district court found, "[a]t no time during the application or approval process did FPL, FPC or the Commission definitively state that FPL would exclusively provide service to Brevard County." App. 22a.[3] Indeed,

[3] The transcript of the Commission's 1964 hearing contains only three isolated and offhand references to Brevard County. The first occurred during the opening statement of FPL's counsel, when he observed that the FPL and FPC "systems were growing closer together in the area of the boundary between Orange and Brevard and Osceola and Brevard counties." (RF-149-T5-5.) The second reference, during the testimony of FPL witness A.B. Wright, similarly adverted to burgeoning competition between FPL and FPC "in the Volusia and Seminole county areas, and to a lesser, but nevertheless important, degree, in the Orange-Brevard County and Osceola-Brevard County areas." (RF-149-T5-10.) The only other mention of Brevard County came from FPL witness B.H. Fuqua, who stated that FPL's and FPC's "territories were growing closer together . . . . in the areas of Volusia, Seminole, Orange,

to the contrary, FPL's request for Commission approval of the 1958 and 1962 letter agreements expressly acknowledged that they were "not comprehensive" and left "unresolved" the question of how other counties would be serviced by the utilities. *See supra* at p. 4, n.1.

FPL and FPC did not dispute this evidence, but urged the district court to find that Brevard County had been impliedly allocated to FPL under the 1958 and 1962 letter agreements submitted for Commission approval. The utilities pointed out that the line marking FPC's territory on the highway maps of Orange and Osceola Counties appended to the 1962 letter agreement traced the eastern boundary of those counties. Because Brevard County lies to the east of Orange and Osceola Counties, the utilities argued, it had impliedly been allocated to FPL. The utilities further pointed out that the Commission between 1981 and 1987 had devised comprehensive maps of established utility service markets in Florida, and that Brevard County was shown within FPL's territory on those maps. The utilities also relied heavily on the Commission's 1989 declaratory statement—issued after this lawsuit had been filed—in which the Commission construed its 1965 Order as impliedly allocating Brevard County to FPL.

4. The district court denied the motions for summary judgment. Applying the two-pronged test set out in *California Retail Liquor Dealers Ass'n* v. *Midcal Aluminum, Inc.*, 445 U.S. 97 (1980), the district court observed that "[t]o establish [state-action] immunity, a party must show (1) that the challenged restraint on competition is one 'clearly articulated and affirmatively expressed as state

---

Osceola, and Brevard counties." (RF-149-T5-33.) No participant at the hearing, however, stated that the territorial agreements under submission would resolve the issue of competition in Brevard County. Rather, from the context of the statements at the hearing, it reasonably appeared that the utilities intended to reserve that question for another day.

policy' and (2) that 'the policy [is] actively supervised by the State itself.'" App. 17a (quoting *Midcal*, 445 U.S. at 105). The district court then held that Florida's "clearly articulated" policy is to permit the use of exclusive territories for the sale of electric power, but *only* when such territorial agreements have been submitted to and approved by the Florida Public Service Commission. *See* App. 20a (citing *City Gas Co.*, 182 So.2d at 436). Accordingly, in this case, "if FPL and FPC denied FPC's service to Plaintiff pursuant to a territorial agreement, and such agreement was never approved by the Commission, the actions of FPL and FPC would not merit state action immunity protection." App. 20a-21a. Reviewing the documentary evidence relating to the Commission's 1965 Order, the court found that "[s]uch documentation gives rise to conflicting interpretations of the intent of Defendants and the Commission regarding the provision of service in Brevard County." App. 22a. The court thus concluded that a genuine issue of material fact—whether the Commission had intended in 1965 to approve any allocation of territory in Brevard County—precluded summary judgment.

5. All parties took an immediate appeal from the district court's denial of summary judgment.[4] The United States Court of Appeals for the Eleventh Circuit reversed and entered summary judgment in favor of the utilities. It agreed that the determinative issue was whether the Commission had in fact approved the utilities' territorial allocation of Brevard County, but it disagreed with the district court that this issue was to be resolved by reference to the Commission's action in 1965. *See* 64 F.3d at 612, App. 5a. Rather, the court of appeals stated that the

[4] The court of appeals had jurisdiction over these appeals under the collateral-order doctrine and the established rule that "[d]enial of state action immunity from antitrust liability by summary judgment is immediately appealable." 64 F.3d at 611, App. 2a (collecting cases).

proper inquiry was "whether, in the order approving the territorial agreement *or in events since that time*, there has been sufficient 'state action' by the Florida Public Service Commission which would allow FPC and FPL to divide service territories in Brevard County." 64 F.3d at 611, App. 3a (emphasis in original).

Having redirected the legal inquiry away from whether the Commission approved the private anticompetitive pact at the time of its making to whether the Commission approved the pact at some point thereafter, the court of appeals turned to the evidence in this case. The court first found the evidence inconclusive with respect to whether Brevard County fell within the scope of the Commission's 1965 Order. Although the court thought it "entirely plausible" and "[a] logical interpretation" of the 1965 Order to infer that Brevard County was silently allocated to FPL by the Commission in 1965, *see* 64 F.3d at 613, App. 7a, the court's judgment did not rest on that ground.[5] Instead, the court of appeals held that "[e]ven if it was not clearly intended in the original agreements to include Brevard County, . . . the way the parties and particularly the Commission have conducted themselves since that time indicates that Brevard County has been allocated to FPL's service area." 64 F.3d at 613, App. 8a. Specifically, the court pointed to the Commission's conduct in the 1980s, when it developed maps showing Brevard County in FPL's service territory, and to the Commission's 1989 declaratory statement. *See*

---

[5] Nor, of course, could the court properly have entered summary judgment against Praxair on that basis, in light of the established rule that "[i]f reasonable minds might differ on the inferences arising from undisputed facts, then the court should deny summary judgment." *Warrior Tombigbee Transp. Co. v. M/V Nan Fung*, 695 F.2d 1294, 1296-97 (11th Cir. 1983). The Eleventh Circuit's conclusion that it was an "entirely plausible" inference that Brevard County had been impliedly allocated by the 1965 Order stopped pointedly short of holding that this was the *only* plausible inference that could be drawn from the record.

64 F.3d at 613-14, App. 8a. The court held that this recent governmental conduct was sufficient to confer state-action immunity on the utilities' early-1960s pact to abolish competition in Brevard County.

The court of appeals denied Praxair's petition for rehearing and suggestion of rehearing *en banc*. App. 29a.

REASONS FOR GRANTING THE PETITION

Certiorari should be granted in this case for two reasons. *First*, the decision below creates a conflict with the Ninth Circuit over whether a state agency may confer retroactive state-action immunity upon the past anticompetitive conduct of private parties. *Second*, the Eleventh Circuit's decision upholding such a *post hoc* grant of immunity presents squarely a choice between two competing models of the state action doctrine, the persistence of which has resulted in muddled decisionmaking in the lower courts. This Court's review thus would settle an issue of fundamental importance to federal antitrust policy and provide much-needed clarity with respect to the scope of the state action doctrine.

1. The ruling below that a state agency's *post hoc* approval can immunize the past anticompetitive conduct of private parties is in conflict with the rule of law announced in the Ninth Circuit's recent decision in *Columbia Steel Casting Co.* v. *Portland General Electric Co.*, 60 F.3d 1390 (9th Cir. 1995). Presented with a substantially identical Sherman Act challenge to exclusive utility service territories in Portland, Oregon, the Ninth Circuit held that a state agency's *post hoc* approval of such territories cannot retroactively confer state-action immunity upon private conduct undertaken to create and enforce those territories years earlier. *See id.* at 1398 n.7. The conflict between the rule applied by the Ninth Circuit and the rule applied in the decision below is apparent from a brief comparison of the two cases.

The plaintiff in *Columbia Steel Casting* was a customer of Portland General Electric Company ("PGE") who sought to purchase electric power from Portland's other electric utility, Pacific Power & Light. When PGE objected on the ground that the plaintiff was located in PGE's exclusive service territory under a 1972 agreement with Pacific Power & Light, the plaintiff sued, alleging that the utilities' territorial pact violated the Sherman Act. PGE claimed immunity under the state action doctrine, arguing that the pact had been approved in a 1972 order of the Oregon Public Utilities Commission ("PUC"). PGE also sought a declaratory statement by the PUC affirming that its 1972 order had approved the territorial division; like the Florida Commission in this case, the Oregon PUC obliged by issuing "a declaratory order, stating that while 'perhaps [the 1972 Order] did not unambiguously allocate exclusive service territories to PGE and PP & L,' it was the PUC's intent to approve such an allocation." 60 F.3d at 1394.

Although the Ninth Circuit ultimately held that PGE was entitled to protection under the state action doctrine, the court made clear that the determinative question was whether it was reasonably foreseeable to the Oregon PUC, *when it acted in 1972*, that its approval of the utilities' agreement would create exclusive service territories. In so holding, the court of appeals expressly refused to accord significance to the agency's post-litigation attempts to reach back in time and retroactively "immunize" private exclusionary conduct that had occurred years earlier. *Id.* at 1398 n.7. The Ninth Circuit reasoned:

> "Of course, PGE cannot base its foreseeability argument on the clarifications made by the PUC *after* the anticompetitive conduct at issue in this case, since it could not have relied upon those statements when it decided to oppose the transfer of Columbia to PP & L. The question is whether the anticompetitive actions were authorized when undertaken, which

> turns on whether they were a foreseeable consequence of the actions the PUC had taken up to that point. Thus, neither the PUC's retroactive amendment of its 1972 Order in 1992, nor its litigation positions in this case, can create PGE immunity for actions taken in 1989-90."

Id. (emphasis in original).

The Ninth Circuit's conclusion that the Oregon PUC in 1992 could not retroactively confer state-action immunity upon private exclusionary conduct that had occurred two years earlier is squarely in conflict with the Eleventh Circuit's conclusion in this case. Here, the Eleventh Circuit effectively acknowledged that summary judgment could not be granted to the utilities based upon the Florida Public Service Commission's 1965 Order, but went on to find that the utilities' conduct had been retroactively immunized by the Commission's conduct in the 1980s—including, in particular, its post-litigation declaratory statement. *See* 64 F.3d at 613-14, App. 8a. The Eleventh Circuit thus based its holding upon precisely the sort of *post hoc* agency actions that the Ninth Circuit held could not confer retroactive immunity.

2. This conflict between the Ninth and Eleventh Circuits warrants immediate resolution by this Court because the question over which they have divided goes to the very foundation of the state action doctrine and carries broad implications for other cases. The Ninth and Eleventh Circuits' conflicting formulations reflect two fundamentally different models of the state action doctrine. Although this Court's cases strongly suggest that the Ninth Circuit has adhered to the correct understanding of the doctrine's theoretical basis, the persistence of these two competing models has resulted in significant confusion and erratic results in the lower courts.

a. When this Court first articulated the state action doctrine in *Parker* v. *Brown*, 317 U.S. 341 (1943), it immunized only the conduct of state officials from anti-

trust liability. This Court found in the Sherman Act "no mention of the state as such, and . . . no hint that it was intended to restrain state action or official action directed by a state." *Id.* at 351. "In a dual system of government in which, under the Constitution, the states are sovereign," the Court reasoned, "an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress." *Id.*

This Court later extended the state action doctrine to shield the conduct of private parties when the State has *authorized* or *directed* their actions as a matter of state policy. Thus, in *California Retail Liquor Dealers Ass'n* v. *Midcal Aluminum, Inc.*, 445 U.S. 97 (1980), this Court held that private anticompetitive conduct may be immune from antitrust liability when "the challenged restraint [is] . . . 'one clearly articulated and affirmatively expressed as state policy' . . . [and] the policy [is] . . . 'actively supervised' by the State itself." *Id.* at 105 (citations omitted).

This Court has offered two related rationales for extending *Parker* immunity to private actors. *First,* the Court has observed that "there may be cases in which the State's participation in a decision [to restrain trade] is so dominant that it would be unfair to hold a private party responsible for his conduct in implementing it." *Cantor* v. *Detroit Edison Co.*, 428 U.S. 579, 594-95 (1976). *Second,* the Court has reasoned that it would seriously undercut the authority of the States to implement their own policies—the very authority that *Parker* sought to vindicate—if private parties could be held liable for conduct taken at the State's behest. *E.g., Patrick* v. *Burget,* 486 U.S. 94, 100 (1988) ("If the Federal Government or a private litigant always could enforce the Sherman Act against private parties, then a State could not effectively implement a program restraining competition among them."). At the same time, this Court has emphasized that state-action immunity for private parties remains "disfavored," *FTC* v. *Ticor Title Ins. Co.*, 504 U.S. 621, 636 (1992), and should not be expanded

beyond the scope necessary to serve these policy rationales. At bottom, this Court has "sought to ensure that private parties c[an] claim state-action immunity from Sherman Act liability only when their anticompetitive acts were truly *the product* of state regulation." *Patrick*, 486 U.S. at 100 (emphasis added).

These rationales are entirely consistent with the understanding of the state action doctrine reflected in the Ninth Circuit's *Columbia Steel Casting* decision. That model of the state action doctrine permits private parties to claim the benefit of state-action immunity only when their conduct is fairly attributable to the State, *i.e.*, when it may be said to be "truly *the product* of state regulation." *Patrick*, 486 U.S. at 100 (emphasis added). Thus, for the Ninth Circuit, "[t]he question is whether the [private] anticompetitive actions were authorized [by the the State] when undertaken," not whether they were ever thereafter approved by the State. *See* 60 F.3d at 1398 n.7. *Post hoc* statements of approval by the State are irrelevant under the Ninth Circuit's approach because the private actor "could not have relied upon those statements when it decided" to pursue its anticompetitive course of conduct. *Id.* Consistent with this Court's rationales for extending the state action doctrine to private parties, the Ninth Circuit's requirement of contemporaneous state approval ensures that no individual will be penalized for actions directed by the State and that the State remains free to enlist private actors in implementing state policy prospectively. At the same time, the Ninth Circuit's insistence upon contemporaneous state approval of private anticompetitive behavior safeguards federal antitrust policy by denying States the power to "ratify" past anticompetitive conduct of private parties undertaken without state approval or scrutiny. In this way, the Ninth Circuit's holding remains true to *Parker*'s admonition that federal law, while permitting "a stat[e] control over its officers and agents," does not empower "a state . . . [to] give immunity to those who violate the Sherman Act by authorizing them to violate it, or [simply] by declaring that their action is lawful." 317 U.S. at 351.

This model of the state action doctrine also is more consistent with the focus of the two-pronged inquiry set out in *Midcal Aluminum* for determining when private actors may claim the protection of the State's antitrust immunity. In particular, this Court's emphatic requirement that private conduct be "actively supervised" by the State in order to fall within the state action doctrine seems at odds with a State's power to reach back in time and immunize purely private conduct that at the time of its occurrence may have been wholly unknown to the State. This Court's recent explanation of the "active supervision" requirement underscores this point:

> "*Midcal* confirms that while a State may not confer antitrust immunity on private persons by fiat, it may displace competition with active state supervision if the displacement is both intended by the State and implemented in its specific details. Actual state involvement, not deference to private price-fixing arrangements under the general auspices of state law, is the precondition for immunity from federal law."

Ticor Title, 504 U.S. at 633. Where a State simply reviews and ratifies a private anticompetitive pact years after the fact, the State can hardly be said to have "played a substantial role in determining the specifics of the [challenged] economic policy," *id.* at 635; to the contrary, the State's *post hoc* ratification resembles much more closely the sort of attempt to "confer antitrust immunity on private persons by fiat" that this Court has expressly and repeatedly condemned, *id.* at 633.

b. The Eleventh Circuit's approach in this and other cases reflects a very different model of the state action doctrine. Under this model, the central concern is not whether the private actor may be fairly characterized as an agent of the State, but whether the State chooses, at any time, to adopt the private conduct as its own. Whereas the Ninth Circuit's understanding of the state action doctrine vindicates a State's power to *regulate* private commercial behavior, the Eleventh Circuit's ap-

proach goes further and affirms a State's power to *pardon* past behavior as well.

Thus, in addition to the decision below, several cases have affirmed state-action immunity for private conduct based on subsequent state declarations "ratifying" the private conduct. In *Municipal Utilities Board of Albertville* v. *Alabama Power Co.*, 21 F.3d 384 (11th Cir. 1994), *cert. denied*, 115 S. Ct. 1096 (1995), for example, the Eleventh Circuit affirmed state-action immunity for private utility territorial pacts dating back to 1954 based on a 1985 Alabama statute ratifying those pacts as state policy. Similarly, the Fifth Circuit held that a telephone company's exclusionary rate practices were immune from antitrust scrutiny in part because the state public utility commission had approved the reasonableness of the challenged rates in an order issued *after* the commencement of the litigation. *See DFW Metro Line Servs. v. Southwestern Bell Tel. Corp.*, 988 F.2d 601, 606 (5th Cir.), *cert. denied*, 114 S. Ct. 183 (1993). "Most importantly," the Fifth Circuit held, the existence of a *pending* proceeding before the state utility commission concerning the rates demonstrated that the State was "actively supervising" the private restraint and warranted the allowance of state-action immunity. *See id.* at 606-07. Although such reflexive deference to state expressions of policy pays homage to the "principles of federalism" upon which the state action doctrine rests, *see, e.g., Ticor Title Ins. Co.*, 504 U.S. at 633, it is not easily squared with this Court's explanations of the animating principles of the doctrine and the Court's admonition that extension of the doctrine to protect private parties is "disfavored" and must be confined within narrow bounds. *See Ticor Title Ins. Co.*, 504 U.S. at 636; *Patrick*, 486 U.S. at 100.

Indeed, under similar reasoning, even where a State has not yet reviewed the challenged private restraint, "the regard for state interests that underlies the *Parker* doctrine could suggest that the state be allowed an opportunity to

grant an express approval, once [the] practice is challenged [in court]." I Phillip Areeda & Donald F. Turner, *Antitrust Law* ¶ 213, at 79 (1978) (footnote collecting cases omitted). Although Professors Areeda and Turner ultimately reject this suggestion as inimical to federal antitrust policy, *see id.*, its adoption by some courts reflects the confusion engendered by the existence of competing models of the state action doctrine.

3. Recent cases demonstrate that the factual scenario involved in this case—a State's attempt to confer retroactive immunity upon past private anticompetitive conduct—is hardly unique. In addition to this case, the Ninth Circuit's decision in *Columbia Steel Casting* and the Eleventh Circuit's decision in *Municipal Utilities Board of Albertville* both involved recent state attempts to "ratify" agreements by which private parties had created and enforced exclusive service territories years earlier. Other cases, such as the Fifth Circuit's decision in *DFW Metro Line Services*, although not involving express state attempts to confer retroactive immunity, similarly present the issue whether subsequent state agency review and approval of past private conduct can shield that conduct from antitrust liability. The issue presented by this case is thus both important and recurring.

Even if States are empowered to grant prospective immunity to private parties by reviewing their ongoing anticompetitive conduct and affirming it as state policy, there is no sound reason for permitting them to immunize *past private* conduct that was undertaken without authorization or regulation by the State. Although this Court stated in *Parker* itself that a State may not "give immunity to those who violate the Sherman Act . . . [simply] by declaring that their action is lawful," 317 U.S. at 351, a half-century later lingering uncertainty about the theoretical basis of the state action doctrine continues to lead lower courts to find immunity based upon *post hoc* declarations of state approval.

In this case, Praxair has been forced to pay non-competitive rates for electric service because of a territorial pact entered into by two utilities without state review or approval; the Eleventh Circuit, however, held that this longstanding anticompetitive conduct was wholly immune from antitrust scrutiny based on expressions of state approval that occurred two decades after Praxair received its first electric bill. That holding is possible only under a model of the state action doctrine that ignores this Court's original explanation of the justifications for extending the doctrine to private parties. Because the decision below has broad implications for the scope of the state action doctrine and creates a conflict with the rule of law applied by the Ninth Circuit in *Columbia Steel Casting*, this Court's intervention is warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

CARTER G. PHILLIPS
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 736-8000

NATHAN P. EIMER
CONSTANTINE L. TRELA, JR.*
DAVID D. MEYER
SIDLEY & AUSTIN
One First National Plaza
Chicago, Illinois 60603
(312) 853-7000

Counsel for Petitioner

March 14, 1996

* Counsel of Record

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

No. 94-2165

PRAXAIR, INC.,
Plaintiff-Appellee,
Cross-Appellant,

v.

FLORIDA POWER & LIGHT CO.;
FLORIDA POWER CORP.,
Defendants-Appellants,
Cross-Appellees.

Appeals from the United States District Court
for the Middle District of Florida

Sept. 19, 1995

Before COX, Circuit Judge, RONEY and WOOD *, Senior Circuit Judges.

RONEY, Senior Circuit Judge:

Florida Power Corp. and Florida Power & Light Co. appeal the district court's denial of their motion for summary judgment in which the utilities asserted state action

* Honorable Harlington Wood, Jr., Senior U.S. Circuit Judge for the Seventh Circuit, sitting by designation.

immunity from Praxair, Inc.'s claim of federal antitrust liability. Praxair cross-appeals the denial of its partial summary judgment motion. At issue is whether state action can be inferred from the manner in which the State conducts itself in relation to the parties' attempts at competition. Since there was sufficient state action so that the utilities should have been granted immunity on summary judgment, we reverse the contrary decision of the district court.

Although neither party raised a question of jurisdiction, each filed briefs in response to a jurisdictional question raised by this Court. It is not necessary to discuss the jurisdictional issues. The district court granted Praxair's motion to certify for immediate appeal the court's denial of its cross-motion for summary judgment. 28 U.S.C. § 1292(b). Although a prior panel of this Court denied permission, in order to remove any doubt about the jurisdiction of this panel to hear these fully argued appeals, we vacate the previous order and grant § 1292 (b) jurisdiction of Praxair's appeal. There is collateral order appellate jurisdiction of the appeals of Florida Power and Florida Power & Light. *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546-47, 69 S.Ct. 1221, 1225-26, 93 L.Ed. 1528 (1949). Denial of state action immunity from antitrust liability by summary judgment is immediately appealable. *Commuter Transportation Systems, Inc. v. Hillsborough County*, 801 F.2d 1286, 1289 (11th Cir.1986); *see also Askew v. DCH Regional Health Care Authority*, 995 F.2d 1033, 1036 (11th Cir.), *cert. denied*, —— U.S. ——, 114 S.Ct. 603, 126 L.Ed. 2d 568 (1993).

This lawsuit stems from Florida Power & Light's (FPL) refusal to negotiate a lower rate for Praxair and Florida Power Corp.'s (FPC) refusal to provide service because of a 1965 territorial agreement. Praxair, and its predecessor Union Carbide, is located in Mims in Brevard County, Florida, an area historically served by Florida Power & Light and, according to the utilities, specifically

allocated to FPL in the territorial agreement. Praxair contends Brevard County was never included in the agreement which the Commission approved. The question presented is whether, in the order approving the territorial agreement *or in events since that time,* there has been sufficient "state action" by the Florida Public Service Commission which would allow FPC and FPL to divide service territories in Brevard County without violating section 1 of the Sherman Act, 15 U.S.C. § 1. We hold there has been appropriate state action.

If a territorial agreement is made effective "solely by virtue of a contract, combination or conspiracy of private persons, individual or corporate," it would violate the Sherman Act. *Parker v. Brown*, 317 U.S. 341, 350, 63 S.Ct. 307, 313, 87 L.Ed. 315 (1942); 15 U.S.C. §§ 1, 2. Conduct that otherwise would violate federal antitrust laws may nevertheless be permissible when done under the aegis of the State. 317 U.S. at 350, 63 S.Ct. at 313; *Municipal Utilities Board of Albertville v. Alabama Power Co.*, 934 F.2d 1493 (11th Cir.1991).

For private conduct to qualify for immunity under the state action doctrine, the challenged restraint must meet a two-pronged test. *First,* it must be "clearly articulated and affirmatively expressed as state policy." *Second,* "the policy must be actively supervised by the State itself." *California Retail Liquor Dealers Ass'n v. Midcal Aluminum,* 445 U.S. 97, 105, 100 S.Ct. 937, 943, 63 L.Ed. 2d 233 (1980). These two requirements operate hand-in-hand to ensure that the displacement of competition occurs only as a result of deliberate and intentional state policy. *Federal Trade Commission v. Ticor Title Insurance Co.,* 504 U.S. 621, 112 S.Ct. 2169, 119 L.Ed.2d 410 (1992). A clearly articulated policy can be established if a state statute authorizes an agency to regulate the area and "provides" for a regulatory scheme that inherently displaces unfettered business freedom. *Executive Town & Country Services, Inc. v. City of Atlanta,* 789 F.2d 1523, 1529 (11th Cir.1986).

As to the first prong of *Midcal*, the district court at first noted that "Florida case law and . . . Florida's current statutory and regulatory provisions . . . has effectively displaced competition between electric utilities in the retail market" and indicates a "clearly articulated and affirmatively expressed state policy" to regulate retail electric service areas. Order at 9-11. *See Storey v. Mayo*, 217 So.2d 304, 307 (Fla.1968) (noting that "the powers of the Commission over these privately-owned utilities is omnipotent within the confines of [Chapter 366] and the limits of organic law), *cert. denied*, 395 U.S. 909, 89 S.Ct. 1751, 23 L.Ed.2d 222 (1969); *City Gas Co. v. Peoples Gas System, Inc.*, 182 So.2d 429, 435 (Fla. 1965) (Chapter 366 of Florida Statutes "add up to what can be considered a very extensive authority over the fortunes and operation of the regulated entities"); Fla.Stat. § 366.04(3) (directing the Commission to exercise its powers to avoid "uneconomic duplication of generation, transmission, and distribution facilities"); *see also PW Ventures, Inc. v. Nichols*, 533 So.2d 281, 283 (Fla. 1988) (holding that "the regulation of the production and sale of electricity [under Chapter 366] necessarily contemplates the granting of monopolies in the public interest").

As to the second element of *Midcal*, the district court concluded that generally "the Commission's extensive control over the validity and effect of such agreements negates any inference that the privately initiated agreements lack state supervision." Order at 18. The Florida Supreme Court has held that the effect of the Commission's approval of territorial agreements between public utilities "is to make the approved contract an order of the commission, binding as such upon the parties. *City Gas*, 182 So.2d at 436.

Having said that, however, the district court then denied the parties' cross-motions for summary judgment on the ground there was a disputed issue of material fact concerning whether Mims was located in the area covered

by the approved agreement. Praxair had argued that the Commission had never approved an agreement between the utilities that included Brevard County.

In our judgment, the district court erroneously focused primarily on the utilities' and Commission's intent in the original proceedings which culminated in the 1965 approval order, and did not give proper consideration to the parties' conduct and the Commission activity since that time.

The validity of a territorial agreement under Florida's noncompetition policy is premised on Commission approval. *See City Gas,* 182 So.2d at 436; Fla.Stat. §§ 366.04(2), .05(7)-(8). If Florida Power denied service to Praxair presumably because of a territorial agreement, but the area in question was never approved by the Commission, the utilities' actions would not merit state action immunity because of the lack of "active state supervision." *Ticor,* 504 U.S. at 636, 112 S.Ct. at 2178. If however the Commission has allocated Brevard County to Florida Power & Light, then the utilities should be accorded state action immunity and summary judgment is appropriate. *Menuel v. City of Atlanta,* 25 F.3d 990, 994 (11th Cir.1994).

Whether the particular anticompetitive conduct was approved by the State turns on two factual inquiries. The first concerns events surrounding the Commission's approval of the territorial agreements that resulted in Order No. 3799 in 1965. The second relates to the parties' actions since the 1965 order which culminated in the Commission's 1989 declaratory statement interpreting that order.

In its 1965 Order, the Commission expressly approved several territorial agreements involving FPL and FPC, including the agreement at issue. The purpose of the agreement was to avoid duplication of service in areas of the state where there was significant population growth and where the utilities' service areas were converging.

According to the Commission, unrestrained competition in those areas would be inefficient and uneconomical both for the utilities and its customers. The Commission's approval "allow[ed the utilities] to agree not to serve within certain areas when requested to do so by a person applying for electrical service, if that area is already served by another utility." Neither utility could deviate from the order without prior approval from the Commission. *In re: Proposed Territorial Agreement Between Florida Power & Light Co. and Florida Power Corp.*, No. 7420-EU, Order No. 3799 (Apr. 28, 1965).

The territorial agreements which were the basis of the order originally were agreed upon by the utilities in 1958 and expanded in 1962. The 1958 letter agreement said that neither company would serve or offer to serve a customer outside the service area "shown on the following maps." Attached were highway maps of Volusia County and Seminole County with red pencil lines to distinguish between the respective service areas. The 1962 agreement expanded the territory to the south and included maps for Orange and Osceola Counties. No map was submitted specifically for Brevard County. Brevard County was shown on both maps however, and the border line ran along the entire Brevard County line.

Attached to the utilities' application to the Commission, and later incorporated by reference into Order No. 3799, was a composite map which similarly depicted a red line demarcating the entire proposed geographic boundary. The line commenced at the northwestern corner of Volusia County at Lake George, meandered eastward between Volusia and Seminole Counties, and continued southward along the border between Orange, Osceola, and Brevard Counties. The line terminated at the southernmost point of Brevard County. In public hearings held before the Commission, witnesses testified that areas to the east or right of the red boundary line were to be served by FPL, and those to the west or left of the line would be served by FPC. Brevard County is located in the area east of

the line, in FPL's service area. During the hearing, witnesses discussed the need for the agreement due to growth in areas between Volusia and Seminole Counties and between Orange and Osceola Counties. The witnesses stated there was competition to a lesser, but still important, degree in the Orange-*Brevard* County and Osceloa-*Brevard* County areas. Brevard County was mentioned only one other time during the hearing. Testimony indicated that the boundary line had not been extended further to the north because that area was served by a rural electric cooperative. Similarly, it was not extended south of Brevard County because those areas were not developed to the extent the utilities anticipated competition for the same customers.

Nearly twenty-five years later, during which time Florida Power & Light solely provided electricity to Brevard County, FPL asked the Commission to issue a declaratory statement whether the utilities would violate Order No. 3799 if they complied with Praxair's request for Florida Power to sell Praxair electricity and for Florida Power & Light to "wheel" the FPC-generated electricity to Praxair's plant. Wheeling is a process whereby a utility transfers power generated by a second utility over the first utility's power lines. The Commission's statement issued in February 1989, concluded that Florida Power & Light's wheeling power to the Mims plant would be in contravention of its earlier order.

A logical interpretation of the Commission's 1965 order is that Brevard County was included. In the 1958 letter agreement, the territorial boundary was a two-sided, east-west division: the area east of the line, Volusia County, was allocated to FPL and the area west of the line, Seminole County was given to FPC. The 1962 agreement took the boundary further south. It is undisputed that the area west of the boundary, Orange and Osceola Counties, was allocated to FPC. It is entirely plausible and a reasonable explanation that the area east

of the boundary, which encompassed only Brevard County, belonged to FPL. Testimony during the public hearings confirms that view.

Even if it was not clearly intended in the original agreements to include Brevard County, however, the way the parties and particularly the Commission have conducted themselves since that time indicates that Brevard County has been allocated to FPL's service area. An agency's interpretation of its own regulations must be given controlling weight unless that interpretation is plainly erroneous or inconsistent with the regulation. *Stinson v. United States,* —— U.S. ——, ——, 113 S.Ct. 1913, 1919, 123 L.Ed.2d 598 (1993); *Florida Gas Transmission v. FERC,* 741 F.2d 1307, 1309 (11th Cir. 1984); *PW Ventures,* 533 So.2d at 281. Florida Power & Light was already serving Mims and Brevard County when the agreement was approved. For 30 years since that time, the Commission and the utilities have treated Mims as part of Florida Power & Light's service territory. During its 1981 to 1987 comprehensive review of approved territorial agreements, the Commission developed maps which depicted Brevard County in FPL's service area. Thereafter, the Commission denied its request to sell electricity to Praxair at a special rate. Finally, in its 1989 declaratory statement, the Commission specifically found that "pursuant to the applicable Florida Statutes and case law," Florida Power & Light could not wheel power to Praxair because it would be in contravention of the approved territorial agreement. Order No. 20808 at 5. In view of the evidence before it, the Commission reasonably interpreted the prior agreement to allocate Brevard County to Florida Power & Light.

Florida's regulatory scheme met the two-pronged *Midcal* test so that the utilities are immune from Sherman Act challenges. The court's denial of Florida Power's and Florida Power & Light's joint motion for summary judgment is reversed. Praxair's cross-appeal of the denial

of its motion for summary judgment, which is based on the premise that Brevard County was not included in the approved territory agreement, is affirmed.

APPEAL: REVERSED.

CROSS-APPEAL: AFFIRMED.

APPENDIX B

[Filed Dec. 8, 1993]

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

Case No. 88-1622-CIV-T-21C

UNION CARBIDE CORPORATION,
a New York corporation,
Plaintiff

v.

FLORIDA POWER & LIGHT COMPANY,
a Florida corporation, and
FLORIDA POWER CORPORATION,
a Florida corporation,
Defendants

ORDER

This cause comes before the Court on Defendants' Motion for Summary Judgment (Dkt. #10) and on Plaintiff's Motion for Partial Summary Judgment (Dkt. #32). This Order will address these Motions and several additional motions pending herein.

FACTUAL BACKGROUND

Plaintiff Union Carbide [1] brought this antitrust action against Defendants Florida Power Corporation ("FPC")

---

[1] Pending in this action is Plaintiff Union Carbide's Motion to Substitute Parties (Dkt. #129). Plaintiff indicates that it has spun off the assets and business that are the subject of this lawsuit into a corporation known as Praxair, Inc., a Delaware corporation. For the purposes of this Order, the Court will refer to Plaintiff as Union Carbide or as Plaintiff.

and Florida Power and Light ("FPL") in October of 1988. Plaintiff alleges that a territorial agreement between FPL and FPC, pursuant to which FPL provides retail electric service to Plaintiff's plant in Brevard County, constitutes a division of territories by competitors in violation of federal and state antitrust laws.

The alleged unlawful agreement stems from negotiations between Defendants in the late 1950s and early 1960s. It appears that Defendants initiated discussions because they were concerned about the convergence of their utility facilities due to expanded growth in various service areas. In an effort to serve the public interest and to eliminate uneconomical and potentially dangerous duplication of facilities, Defendants entered their first agreement in November of 1958. Under this agreement, Defendants set forth "boundaries between their respective service areas," as shown on maps of Volusia County and Seminole County. The parties further agreed that "neither Company [would] serve or offer to serve a customer outside its service area as shown on the attached maps." Letter of FPC to FPL, dated October 28, 1958; accepted and signed November 26, 1958. In September of 1962, Defendants entered a second such arrangement in which they "extend[ed] this territorial boundary agreement to include Orange County and a portion of Osceola County." Letter of FPC to FPL, dated September 4, 1962; accepted and signed September 11, 1962. This second agreement referred to boundaries drawn on attached maps of Orange County and Osceola County.[2]

On June 2, 1964, Defendants became unsure of the validity of their territorial Agreement. They therefore submitted an Application to the Florida Public Utilities Commission ("Commission"),[3] requesting that the Com-

---

[2] The 1958 and 1962 agreements will henceforth be jointly referred to as the "Agreement".

[3] The Florida Public Utilities Commission has subsequently changed its name to the Florida Public Service Commission.

mission hold a hearing and enter an order approving the Agreement.[4] The Application indicated that such an order would help to resolve problems with duplication of service facilities "running roughly from Lake George in Volusia County to the southeast corner of Osceola County." Application at 2. Defendants attached to the Application maps of Seminole, Volusia, Orange and Osceola Counties, and a composite map of the four counties. The individual and composite maps depicted a red line which commenced at the northwestern corner of Volusia County at Lake George, meandered eastward across Volusia and Seminole Counties, and continued northward along the border between Orange and Osceola Counties and Brevard County. The boundary line terminated at the southernmost point of Brevard County.

On June 8, 1964, the Commission held a hearing "In the Matter of Application of Florida Power and Light Company and Florida Power Corporation for Approval of a Territorial Agreement Relative to Their Respective Service Areas in Volusia, Seminole, Orange and Osceola Counties" ("Hearing").[5] The Commission described the agreement to be reviewed as consisting of "two letter agreements, the first dated October 28, 1958, and an amendatory letter dated September 24, 1962, with maps attached showing the territory in question." Hearing Transcript, Dkt. No. 7420-EU (June 8, 1964) at 4. At the Hearing various witnesses testified regarding the advisability of approving the Agreement. Primarily, the

---

[4] Application of Florida Power and Light Company for Approval of an Agreement with Florida Power Corporation Relative to Service Areas, Docket No. 7420-EU (1964) (hereinafter "Application").

[5] The Commission sent notice of the public hearing to the Volusia, Seminole, Orange and Osceola County governments. The record reflects that no notice was sent to the Brevard County government. At the time of the Commission proceedings, Florida law required that agencies inform affected parties of agency hearings. § 120.33 Fla. Admin. Proc. Act, 120 F.S.A. (1961).

witnesses addressed growth in the areas between Volusia and Seminole Counties and between Orange and Osceola Counties which necessitated the Agreement, and the public interest to be served by it. At two instances during the Hearing, witnesses mentioned Brevard County. One witness testified:

> [T]o a lesser extent, the facilities of the two systems [FPC and FPL] were growing closer together in the areas of the boundary line between Orange and Brevard and Osceola and Brevard Counties.

Hearing Transcript at 10. A second witness testified:

> I would say that this [convergence of facilities] was most intense in the Volusia and Seminole County areas, and to a lesser, but nevertheless important degree, in the Orange-Brevard County and Osceola-Brevard County areas.

Hearing Transcript at 11.

Additionally, witnesses clarified the location of the boundary line on the composite map and explained the service areas defined by it. Witnesses stated that the areas to the east or right of the red boundary line were those served by FPL, and those to the west or left of the line were those served by FPC. Defendants were further questioned regarding those areas on the map in which they had not established a boundary line. Defendants indicated that those areas were either served by intervening Rural Electric Cooperatives ("REAs") or "the area[s] [were] not developed to the point where there would be competition between the two companies for the same customers with resultant bad effects." Hearing Transcript at 17 (testimony of witness A.B. Wright, Vice President for Northern Division of Florida Power and Light Company).

On April 28, 1965, following the Hearing, the Commission entered Order No. 3799, which approved the

boundary lines set forth in Defendants' Application.[6] The Order contained the following language:

> In these seven dockets [including Application of FPL and FPC, Docket No. 7420-E] the utilities . . . have entered into agreements where there has been or is about to be some conflict as to the boundaries of the territory that they seek to serve. . . It is even wiser that the Commission and the utilities involved anticipate these conflicts and make effective some reasonable territorial agreement.

The Order further stated that Defendants could not modify the Agreement without approval of the Commission. Since 1965, the parties have applied to the Commission on several occasions for approval to modify the Agreement.[7] Defendants have otherwise provided service and developed their facilities in accordance with Order No. 3799.

---

[6] In re: Proposed territorial agreement between Florida Power and Light Company and Florida Power Corporation, Dkt. No. 7420-EU, Order No. 3799 (April 28, 1965).

[7] In 1971, the Commission approved an agreement between FPC and Tampa Electric Company for the wholesale sale of electric power. In re: Application of Florida Power Corporation for modification of territorial orders, Dkt. No. 71340-EU, Order No. 5255 (October 29, 1971). Again, in 1974, the Commission entered an order which "ratified" an agreement between FPL and FPC to modify and extend boundaries in the City of Sanford. In re: Application of Florida Power & Light Company for approval of a modification of territorial agreement with Florida Power Corporation relative to service area, Dkt. No. 74097-EU, Order No. 6184 (June 28, 1974). In 1989, the Commission conditionally approved a third modification to the Agreement, clarifying the Agreement's procedure for variances in the territorial boundaries due to exceptional circumstances and changes in municipal boundaries. In re: Application of Florida Power Corporation and Florida Power & Light Company for Approval of Amendment of Territorial Agreement, Dkt. No. 890403-EU, Order No. 21309 (June 2, 1989).

From 1981 to 1987, the Commission engaged in an intensive review of the various approved territorial agreements among utility service providers in an effort to develop maps reflecting proper territorial boundaries and service areas. The Commission sent out a series of letters and memoranda to electric utilities throughout Florida, requesting materials and maps regarding territorial boundaries. The Commission then developed a computerized system to organize information regarding service areas, and developed comprehensive maps of service territories. These maps reflect that FPL provides service in Brevard County.

The events giving rise to this action by Plaintiff commenced in 1987. Plaintiff owns a plant located in the town of Mims, Brevard County, Florida, which has always received its electric service from FPL. In 1987, Plaintiff became dissatisfied with FPL's rates, and sought to obtain a special rate. FPL submitted an application to the Commission, seeking approval of a proposed agreement pursuant to which it would provide Plaintiff service at a special rate. However, in April of 1988, the Commission denied FPL's request, stating that a special rate would effectively provide a subsidy of Plaintiff's service at the expense of other customers.[8]

In August of 1988, Plaintiff then asked FPC to sell it electricity. Plaintiff also asked FPL to "wheel" the FPC generated electricity to its Mims plant in Brevard County by using existing FPL power lines. Both FPC and FPL independently refused Plaintiff's request, asserting that they were required to do so by Order No. 3799. In response to this refusal, Plaintiff filed this action in October of 1988.

Later that same month, FPL filed a petition with the Commisison, requesting a declaratory statement that De-

---

[8] In re: Petition of Florida Power and Light Company for approval of large power agreement with Union Carbide Corporation, Dkt. No. 871029-EQ, Order No. 19231 (April 26, 1988).

fendants would violate Order No. 3799 if they complied with Plaintiff's request for the wheeling of power. The Commission issued a declaratory statement in February of 1989, indicating that the wheeling of power would be in contravention of Order No. 3799.[9] The Commission did not, however, address the antitrust implications of Defendants' acts, which Plaintiff now raises in this action.

ANALYSIS

Summary judgment is appropriate only when the Court is satisfied "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). In making this determination, the Court must view all of the evidence in a light most favorable to the non-moving party. *Samples v. City of Atlanta,* 846 F.2d 1328, 1330 (11th Cir. 1988). The burden of establishing the absence of a genuine issue is on the moving party. *Celotex Corp. v. Catrett,* 477 U.S. 317 (1986). However, the burden extends only to facts that might affect the outcome of the suit under the governing law. "Factual disputes that are irrelevant or unnecessary will not be counted." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248 (1986). Once this burden is met, the non-moving party must "go beyond the pleadings and by her own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file, 'designate' specific facts showing that there is a genuine issue for trial.' " *Celotex Corp.,* 477 U.S. at 324. However, a plaintiff need only present evidence from which a jury might return a verdict in its favor in order to survive a summary judgment motion. *Samples,* 846 F.2d at 1330.

Plaintiff and Defendants each make several arguments in support of their summary judgment motions. The Court

---

[9] **In re: Petition of Florida Power and Light Company for a Declaratory Statement Regarding Request for Wheeling, Dkt. No. 881326-EI, Order No. 20808 (February 24, 1989).**

will first address Defendants' contention that the State Action Immunity Doctrine ("Doctrine") bars Plaintiff's attack on the Agreement between FPL and FPC. If, in fact, the Doctrine provides such immunity, the Court need not determine if Defendants' activities violate state and federal antitrust law. The State Action Immunity Doctrine was first enunciated by the Supreme Court in *Parker v. Brown,* 317 U.S. 341 (1943). The Doctrine provides that federal antitrust laws do not apply to proscribe anticompetitive conduct undertaken by or directed to be undertaken by a state. *Southern Motor Carriers Rate Conference v. United States,* 471 U.S. 48, 56-57 (1985); *Municipal Utilities Board of Albertville v. Alabama Power Co.,* 934 F.2d 1493 (11th Cir. 1991). The Doctrine may also preclude antitrust attack on private conduct taken pursuant to state regulation. *Id.* at 1502.

The Supreme Court has established a two part test to determine when private conduct regulated by state law is immune from antitrust attack. To establish immunity, a party must show (1) that the challenged restraint on competition is one "clearly articulated and affirmatively expressed as state policy" and (2) that "the policy [is] actively supervised by the State itself." *California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc.,* 445 U.S. 97, 105 (1980). Compliance with both parts of this test ensures that "the State [will be] responsible for the [anticompetitive activity] it has sanctioned and undertaken to control." *Federal Trade Commisison v. Ticor Title Insurance Co.,* —— U.S. ——, 112 S.Ct. 2169, 2177 (1992). Additionally, both parts of the test ensure that the particular anticompetitive mechanism operates because of a deliberate and intentional state policy. *Id.*

A clearly articulated state policy under the first part of the *Midcal* test will exist when the "state intends to displace competition in a particular field with a regulatory structure." *Southern Motor Carriers,* 471 U.S. at 64. In some instances, a state legislature will expressly state its

intent to displace competition in a given area. *Id.* However, a clearly articulated policy can also be established if a state statute authorizes an agency to regulate the area and "provides for 'a regulatory scheme that inherently displaces unfettered business freedom.'" *Executive Town & Country Services, Inc. v. City of Atlanta*, 789 F.2d 1523, 1529 (11th Cir. 1986) (citation omitted).

A review of Florida case law and of Florida's current statutory and regulatory provisions reveals that Florida has effectively displaced competition between electric utilities in the retail market. The Florida Supreme Court first affirmed the Commission's authority to approve territorial agreements among utilities in *City Gas Co. v. Peoples Gas System, Inc.*, 182 So.2d 429 (Fla. 1965). In *City Gas*, the Florida Supreme Court concluded, "[t]hese provisions [of Chapter 366] add up to what can only be considered a very extensive authority over the fortunes and operation of the regulated entities." *Id.* at 435. The Court further stated, "[i]n short, we are of the opinion that the commission's existing statutory powers over areas of service, both expressed and implied, are sufficiently broad to constitute an insurmountable obstacle to the validity of a service area agreement between regulated utilities, which has not been approved by the commission." *Id.* at 436. In 1974, the Florida legislature incorporated its first specific reference to territorial agreements into Chapter 366 of the Florida Statutes, by expressly granting the Commission jurisdiction to review and approve territorial agreements. Ch. 74-196 1974 Fla. Laws 538 (codified at Fla. Stat. §§ 366.04(2), 366.05(7)-(8)).[10]

---

[10] Section 366.04, "Jurisdiction of the commission", provides in pertinent part:

> (2) in the exercise of its jurisdiction, the commission shall have power over electric utilities for the following purposes:
>
> (d) To approve territorial agreements between and among rural electric cooperatives, municipal electric utilities, and other electric utilities under its jurisdiction. . .

During the 1980s, the Commission proposed several legislative measures to establish service territories, which were not accepted. Therefore, the Commission utilized its statutorily granted authority to enact a comprehensive regulatory scheme governing the adoption of territorial agreements and the resolution of territorial disputes. Fla. Admin. Code, Rules 25-6.0439-0442 (adopted March, 1990). In 1989, the Legislature enacted a revised version of Chapter 366 which permitted the Commission to resolve territorial disputes on its own motion. Fla. Stat. §§ 366.04(2)(e), 366.04(3). Under this current legislative and regulatory scheme, the Commission effectively exercises authority over the designation of territories in which each utility will operate.

The Commission has stated on many occasions that its supervision of territorial agreements among utilities is intended to eliminate the harmful effects of unrestrained competition on individual consumers and on the public.[11] The Florida Supreme Court has similarly concluded that the state has comprehensive control over competition among retail utility service providers. *Storey v. Mayo,*

(e) To resolve, upon petition of a utility or on its own motion, any territorial dispute involving service areas between and among rural electric cooperatives, municipal electric utilities, and other electric utilities under its jurisdiction . . .

* * * *

(5) The commission shall further have jurisdiction over the planning, development, and maintenance of a coordinated electric power grid throughout Florida to assure an adequate and reliable source of energy for operational and emergency purposes in Florida and the avoidance of further uneconomic duplication of generation, transmission, and distribution facilities.

[11] Such harmful effects include "unsatisfactory customer relations", "service inefficiencies," and "the premature erection of more lines than are needed for immediate service, which lessens the immediate return of the investment, and, in effect, must be subsidized by other customers of the utility." Order No. 3799 at 4.

217 So.2d 304, 307 (Fla. 1968) (holding that "the powers of the Commission over these privately owned utilities is omnipotent within the confines of the statute and the limits of organic law"); *see also PW Ventures, Inc. v. Nichols,* 533 So.2d 281, 283 (Fla. 1988) (holding that "the regulation of the production and sale of electricity [under chapter 366] necessarily contemplates the granting of monopolies in the public interest"). The Court has further stated that " '[a]n individual has no organic, economic or political right to service by a particular utility merely because he deems it advantageous to himself.' Larger policies are at stake than one customer's self-interest, and those policies must be enforced and safeguarded by the [Commission]." *Lee County Electric Cooperative v. Marks,* 501 So.2d 585, 587 (Fla. 1987) (citation omitted).

Florida, through its legislation, regulation, and judicial holdings and pronouncements, has demonstrated its intent to displace competition in the field of retail electric service with a regulatory mechanism to designate territorial boundaries. As such, Florida has a "clearly articulated and affirmatively expressed state policy" as contemplated by the first element of *Midcal's* test for state action immunity.

Plaintiff contends that even if Florida has a clearly articulated policy, the actions of FPL and FPC with respect to Plaintiff's Brevard County facility were not taken in accordance with that policy. Plaintiff specifically asserts that the Commission never approved an agreement between Defendants with respect to Brevard County. Under Florida's policy of non-competition, the validity of a territorial agreement is premised on Commission approval. *See City Gas Co. v. Peoples Gas System,* 182 So.2d 429, 436 (Fla. 1965); Fla. Stat. §§ 366.04(2), 366.05(7)-(8). Therefore, if FPL and FPC denied FPC's service to Plaintiff pursuant to a territorial agreement, and such agreement was never ap-

proved by the Commission, the actions of FPL and FPC would not merit state action immunity protection.[12]

Plaintiff's argument centers on the 1958 and 1962 letter agreements, which were incorporated into the 1964 Agreement and subsequently approved by Order No. 3799. Plaintiff asserts that Defendants' Agreement was not intended to place Brevard County within FPL's service territory. In support of this contention, Plaintiff notes that the letters which form the Agreement make no mention of Brevard County. Additionally, Plaintiff argues that the Commission did not intend to approve an agreement concerning Brevard County. Defendants' Application made no mention of Brevard County, Brevard County's government was not notified of the hearing on the Application, and only two references were made to Brevard County at the Hearing on the Application. Lastly, Plaintiff notes that the maps attached to the Agreement and Application, which depict the boundary line, do not include a full map of Brevard County.

In contrast, Defendants assert that they clearly intended to include Brevard County within FPL's service area in their Agreement and subsequent Application. Defendants note that the maps incorporated into their Agreement and used by the Commission to approve the Agreement,

---

[12] Plaintiff relies on the Supreme Court's recent decision in *FTC v. Ticor Title Ins. Co.*, —— U.S. ——, 112 S.Ct. 2169 (1992), to argue that a state must expressly approve the particular anticompetitive act of the party seeking state action immunity. In *Ticor*, the Supreme Court stated that "Midcal's requirement that the State articulate a clear policy shows little more than that the State has not acted through inadvertence; it cannot alone ensure, as required by our precedents, that particular anticompetitive conduct has been approved by the State." Given the Supreme Court's previous statements with respect to state action immunity, it is not likely that the Court would require a state to give express approval of each anticompetitive act. Nonetheless, the Court need not reach this issue for the purposes of this Order, as Florida law does require the Commission to expressly approve all anticompetitive territorial agreements among utilities.

depict a red line running along the borders between Brevard County, and Orange and Osceola Counties. Additionally, testimony at the public hearing reflected that the line contemplated a division of territories, with FPL serving the area to the east or right of the line, and FPC serving to the west or left of the line. Lastly, Defendants contend that following the issuance of Order No. 3799, the Commission has acted as if FPL's service area included Brevard County. Defendants note that maps prepared by the Commission during its 1981-1987 comprehensive review of service territories place Brevard County in FPL's service area.

The Court has closely examined the materials which document the events giving rise to the formation of the Agreement and the Commission's subsequent approval of the Application. Such documentation gives rise to conflicting interpretations of the intent of Defendants and the Commission regarding the provision of service in Brevard County. At no time during the application or approval process did FPL, FPC or the Commission definitively state that FPL would exclusively provide service to Brevard County. However, it was indicated throughout negotiations and proceedings that the Agreement permitted FPL to provide service in areas to the east of the demarcated boundary line, which, in a large portion of the map, included only Brevard County.

The Commission's intent can be better discerned by examining the effect it generally gave to such territorial boundary lines, at the time it approved the Agreement. The Court finds a 1965 statement by the Commission particularly instructive, as it was made during the same year in which the Commission entered Order No. 3799. The Commission explained the effect of approved boundary lines as follows:

> [W]e should not approve an agreement which awards to a utility territory with respect to which there is not a reasonably immediate possibility of duplicating

> service by one or the other of the parties to the agreement. In truth, what we call 'territorial agreements' are more aptly described in most cases as a boundary agreement and the extent of the boundary line should bear a reasonable relationship to the area in which competition may be expected. . . . In the case at hand we have such a boundary drawn across two counties, providing a line of demarcation beyond which neither utility may extend its facilities. While the contractual agreement between the parties went much farther and purported to secure to each company, inviolate from any competition by the other, all that part of the two counties on its side of the line, we do not think that we have the authority to grant our approval to this extent. Rather, our approval should be limited to the establishing of a line beyond which the utilities will not extend their service facilities, and the extent of such line should be limited to the area in which possible encroachment is threatened.

Commission Order No. 3835 (June 24, 1965) (order quoted in *Peoples Gas System, Inc. v. Mason,* 187 So.2d 335, 337 (Fla. 1966)).

Later statements by the Commission have reinforced its 1965 interpretation of territorial boundary lines as allocating territory in areas where competition between utilities is expected. *See e.g.* Order No. 3799 (finding that "the utilities . . . have entered into agreements where there has been or is about to be some conflict as to the boundaries of the territory they seek to serve"); Order No. 20808 (finding that boundary lines serve to prevent overlapping distribution systems in affected areas).

Chapter 366, Florida Statutes, also recognizes that the Commission must examine actual and potential competition to resolve territorial disputes. The Commission will establish territorial boundaries based on factors including "population, the degree of urbanization of the area, its

proximity to other urban areas, and the present and reasonably foreseeable future requirements of the area for other utility services." Fla. Stat. § 366.04(e). Based on the foregoing examination, the Court concludes that the Commission, by establishing a boundary line, intends to allocate to each utility that territory on its respective side of the boundary line in which competition is reasonably expected.

Given this effect of approved boundary lines, the Court must now determine whether a material question of fact exists regarding territory allocated by the boundary line established in Order No. 3799. The line approved by the Commission in 1965 contemplated an allocation of territory in those areas where competition between FPL and FPC would have been reasonably expected in the foreseeable future. Statements made by witnesses at the hearing on Defendants' Application confirm that the line represented the pattern of development of Defendants' systems within Orange, Seminole, Volusia and Osceola Counties, and along the borders between Brevard County and Orange and Osceola Counties. The line established did not extend further into those areas which "in the foreseeable future would not be developed to the point where there would be competition between the two companies for the same customers." Hearing Transcript at 17.

It appears that Mims, Florida is situated within twenty miles from the established boundary line. Given the proximity of the line to Mims and development in the disputed territory, the Court concludes that a genuine issue of material fact remains regarding whether Mims was located in an area to the east of the boundary line in which competition between FPL and FPC was reasonably foreseeable in the future. It is possible that Defendants' refusal to provide FPC's electricity to Plaintiff was in accordance with Order 3799's requirements. The Court therefore cannot conclude as a matter of law that Defendants did not act pursuant to Florida's clearly articu-

lated state policy which allocates territory among utility providers. Conversely, the Court cannot conclude that Defendants acted pursuant to this policy. Accordingly, summary judgment in favor of Defendants is not proper, as a genuine issue remains with respect to whether Defendants' actions fall within the State Action Immunity Doctrine.

Although the Court finds summary judgment in favor of Defendants inappropriate at this juncture, the Court will address the second element of the State Action Immunity Doctrine. If the second element of *Midcal's* test for state action immunity is not met, Defendants' actions will not be afforded immunity. The second prong of the test requires that an articulated state policy be actively supervised by the state. *Midcal,* 445 U.S. at 105. Such supervision prevents the "casting [of] a gauzy cloak of state involvement" over an essentially private anticompetitive activity, *id.* at 106, and ensures that private anticompetitive activity promotes state policy, rather than the interests of private parties. *Municipal Utilities,* 934 F.2d at 1503.

A court will examine several factors to assess a state's participation in operative decisions relating to the anticompetitive conduct at issue. *Id.* A state cannot simply authorize the anticompetitive activity, then enforce the decisions of individual parties made pursuant to its authorization. *Midcal,* 445 U.S. at 105. A state must help to establish the anticompetitive practice, or must review private decisions made pursuant to state authorization. *Id.* at 105. Courts will further examine whether the state monitors conditions in the relevant market and engages in "pointed reexamination of the program." *Id.* at 106. If an examination of these factors reveals that the state has effective control over all decisions being challenged in the antitrust action, the second element of *Midcal's* test will be established. *Municipal Utilities,* 934 F.2d at 1305.

A review of Florida's case law and legislation indicates that Florida actively supervised territorial allocations among utilities in 1965 and has continued to do so. The Florida Supreme Court's decision in *City Gas Co. v. Peoples Gas System,* 182 So.2d 429 (Fla. 1965), established that only those territorial agreements approved by the Commission would be valid. When Defendants submitted their Application to the Commission, it conducted a public hearing, at which witnesses testified and the public participated. The Commission was required to evaluate the public interest of the proposed boundary line and to review the placement of the line to ensure that it reflected anticipated service patterns. Order No. 3799; *see also Utilities Commission of New Smyrna Beach v. Florida Public Service Commission,* 469 So.2d 731, 732 (Fla. 1985). The Commission had the choice to approve or disapprove the Application, and by its written order, approved it. The Commission further maintained continuing jurisdiction over any modifications made to the Agreement to ensure that changes would serve the public interest. Order No. 3799; *see also Peoples Gas System Inc. v. Mason,* 184 So.2d 335, 339 (Fla. 1966).

Since the approval of Defendants' Application, the above procedure for the review and supervision of territorial agreements has been codified and established by regulation. Fla. Admin. Code §§ 25-6.0439-.0442. The administrative code permits the Commission staff to investigate each proposed territorial agreement and evaluate its effect on the relevant territory, customers, and utility facilities. Fla. Stat. § 366.08. Additionally, agreements cannot be modified without Commission approval. *Public Service Commission v. Fuller,* 551 So.2d at 1212. Moreover, the Florida Supreme Court continues to find that an "agreement has no existence apart from the Public Service Commission's order approving it." *Id.*

It is true that utilities may initially negotiate the territorial boundaries to be submitted to the Commission for approval. However, such private conduct constitutes part

of Florida's contemplated scheme for establishment of boundaries. The Florida courts and the Commission have recognized that agreements initiated by utilities enable the economical expansion of utility facilities. *Utilities Commission of the City of New Smyrna Beach*, 469 So.2d at 732; In re Joint Petition of Florida Power Corporation and Withlacoochee River Electric Cooperative for Approval of Territorial Agreement, 88 Fla. Pub. Serv. Comm'n Rep. 6:215 (Order No. 19480, June 10, 1988). The Commission's extensive control over the validity and effect of such agreements negates any inference that the privately initiated agreements lack state supervision. Accordingly, the Court finds that no genuine issue of material fact exists regarding the active supervision exercised by the state of Florida over territorial arrangements among retail utility providers. The second element of *Midcal's* test for state action immunity has therefore been satisfied.

Because a genuine issue of material fact remains regarding Defendants' qualification for state action immunity, the Court cannot conclude that Defendants have, as a matter of law, engaged in violations of state and federal antitrust laws. Accordingly, summary judgment in favor of Plaintiff is not proper at this time.

CONCLUSION

Upon consideration of the foregoing, it is hereby ORDERED and ADJUDGED that:

1. Defendants' Motion for Summary Judgment (Dkt. #10) is DENIED.

2. Plaintiff's Motion for Partial Summary Judgment (Dkt. #32) is DENIED.

3. Defendants are DIRECTED to file a response to Plaintiff's Motion to Substitute Parties (Dkt. #129) on or before December 20, 1993, in the absence of which the Court will take Plaintiff's Motion under advisement and rule thereon.

4. Amicus Curiae Florida Public Service Commission's Motion for Leave to File Response to Union Carbide's Notice Re: Ticor (Dkt. #126) is DENIED as MOOT, as all parties and amicus participants have submitted revised memoranda to the Court.

5. Defendants' Motion to Strike Section III of Plaintiff's Response Re: Supplemental Authority (Dkt. #142) is DENIED as MOOT, as all parties have submitted revised memoranda to the Court.

DONE AND ORDERED, at Tampa, Florida, this 8th day of December, 1993.

/s/ Ralph W. Nimmons, Jr.
RALPH W. NIMMONS, JR.
United States District Judge

Copies to: Counsel of record

APPENDIX C

[Filed Dec. 15, 1995]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 94-2165

PRAXAIR, INC.,
Plaintiff-Appellee
Cross-Appellant,
versus

FLORIDA POWER & LIGHT COMPANY,
FLORIDA POWER CORPORATION,
Defendant-Appellants,
Cross-Appellees.

On Appeal from the United States District Court
for the Middle District of Florida

ON PETITION(S) FOR REHEARING AND
SUGGESTION(S) OF REHEARING EN BANC

Before: COX, Circuit Judge, RONEY and WOOD *,
Senior Circuit Judges

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled

on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Emmett R. Cox
EMMETT R. COX
United States Circuit Judge

APPENDIX D

[Filed Jan. 26, 1994]

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

Case No. 88-1622-CIV-T-21C

PRAXAIR, INC.,
a New York corporation,
Plaintiff

v.

FLORIDA POWER & LIGHT COMPANY,
a Florida corporation, and
FLORIDA POWER CORPORATION,
a Florida corporation,
Defendants

ORDER

This cause comes before the Court on Defendants' Motion for Reconsideration (Dkt. #161) and on Plaintiff's Motion for Clarification or Reconsideration (Dkt. #163). Both Plaintiff and Defendants request that the Court reconsider its December 8, 1993 Order, in which the Court denied summary judgment in favor of both Plaintiff and Defendants.

Defendants request the Court to reconsider that portion of its December 8, 1993 Order in which the Court found that there was a genuine issue of material fact regarding whether Mims was located in an area to the east of the boundary line in which competition between Defendants was reasonably foreseeable in the future. The Court made this finding following an extensive review of the voluminous

documentation submitted by the parties to this action. Defendants neither present new evidence nor advance any new argument in their Motion for Reconsideration which would make a reconsideration of the Court's December 8, 1993 Order appropriate.

Plaintiff, in support of its Motion for Reconsideration, asserts that the Court wrongly focused on the intent of the Florida Public Service Commission in finding that a material issue of fact existed regarding the extent to which the boundary line allocated territory. Instead, Plaintiff argues that the Commisison clearly intended to approve the boundary line agreements between Defendants and that the Court therefore should have examined Defendants' intent when entering the agreements. As set forth in the Court's December 8, 1993 Order, the Court has considered evidence of *both* the intent of Defendants in reaching the boundary agreements and the intent of the Commission in approving the agreements to determine whether such agreements allocated territory in the area occupied by the Mims facility. The Court further notes that prior to issuing its Order, it carefully reviewed each of Plaintiff's submissions and fully considered all of those facts which Plaintiff reiterates in its Memorandum in Support of its Motion for Reconsideration. Such evidence led the Court to conclude that a genuine issue of material fact remained regarding the effect of the boundary line established by the agreements and approved by the Commission.

Plaintiff also requests the Court to reconsider that portion of its Order in which it concluded that no genuine issue of material fact existed that the State of Florida engaged in active supervision over territorial arrangements among retail utility providers. Plaintiff has not advanced any argument in its Motion for Reconsideration which would lead the Court to conclude that a reconsideration of its December 8, 1993 Order is necessary.

Also pending herein is Defendants' Motion to Correct Clerical Mistakes Under F.R.Civ.P. 60(a) [sic] (Dkt. #160). Upon review of the file, it appears that the Court has made the two factual errors set forth in Defendants' Memorandum. These two factual errors, tangentially related to the substance of the Court's Order, have no impact on the Court's findings. Additionally, the Court notes that due to a clerical error, the parties' proposed agreed order, submitted in response to Plaintiff's Motion to Substitute Parties, was not brought to the attention of the Court.

Based on the foregoing, it is hereby ORDERED and ADJUDGED that:

1. Defendants' Motion for Reconsideration (Dkt. #161) is DENIED.

2. Plaintiff's Motion for Clarification or Reconsideration (Dkt. #162) is DENIED.

3. Defendants' Motion to Correct Clerical Mistakes Under F.R.Civ.P. 60(a) [sic] (Dkt. #160) is GRANTED. The two factual errors in the Court's December 8, 1993 Order shall be deemed corrected by entry of this Order in the manner set forth in Defendants' Motion. Additionally, it is noted that the Court was not aware of the parties' proposed agreed order to substitute parties when entering its December 8, 1993 Order.

DONE AND ORDERED, at Tampa, Florida, this 26th day of January, 1994.

/s/ Ralph W. Nimmons
RALPH W. NIMMONS, JR.
United States District Judge

APPENDIX E

BEFORE THE
FLORIDA PUBLIC UTILITIES COMMISSION

Docket No. 7061-EU

IN RE: APPLICATION OF FLORIDA POWER CORPORATION FOR APPROVAL OF TERRITORIAL AGREEMENT WITH CITY OF OCALA.

Docket No. 7420-EU

PROPOSED TERRITORIAL AGREEMENT BETWEEN FLORIDA POWER AND LIGHT COMPANY AND FLORIDA POWER CORPORATION.

Docket No. 7421-EU

TERRITORIAL AGREEMENT BETWEEN FLORIDA POWER AND LIGHT COMPANY AND CITY OF JACKSONVILLE.

Docket No. 7422-EU

TERRITORIAL AGREEMENT BETWEEN FLORIDA POWER AND LIGHT COMPANY AND CLAY ELECTRIC COOP., INC.

Docket No. 7423-EU

TERRITORIAL AGREEMENT BETWEEN FLORIDA POWER AND LIGHT COMPANY AND GLADES ELECTRIC COOP., INC.

Docket No. 7424-EU

TERRITORIAL AGREEMENT BETWEEN FLORIDA POWER AND LIGHT COMPANY AND LEE COUNTY ELECTRIC COOP., INC.

Docket No. 7425-EU

PETITION OF FLORIDA POWER AND LIGHT COMPANY FOR APPROVAL OF TERRITORIAL AGREEMENT WITH SUWANNEE VALLEY ELECTRIC COOPERATIVE, INC.

ORDER NO. 3799

Chairman Edwin L. Mason, Commissioner Jerry W. Carter and Commissioner William T. Mayo each participated in the disposition of this matter.

The entire record herein, including the exhibits and testimony adduced at the public hearings, have all been examined by the full Commission. After due consideration, the Commission now enters its order in this cause.

ORDER

BY THE COMMISSION:

The Commission has jurisdiction over the Florida Power Corporation and Florida Power and Light Company. Although they also offer electrical service, the municipalities and cooperatives involved in these dockets are exempted from Commission jurisdiction by Section 366.11, Florida Statutes. However, in each of the seven dockets with which we are concerned in this order, the applicant is a utility under the jurisdiction of this Commission. That is, for example, in Docket No. 7421-EU, although there is before the Commission an agreement between Florida Power and Light Company and the City

of Jacksonville, the applicant in the case is Florida Power and Light Company, which is, as mentioned, regulated by the Commission.

In these seven dockets the utilities (both exempt and non-exempt) have entered into agreements where there has been or is about to be some conflict as to the boundaries of the territory that they seek to serve. The Commission, in considering these applications, which are in effect allocations of service areas, is concerned with the fact that Section 366.03, Florida Statutes, states that the electric utilities under the jurisdiction of the Commission "shall furnish to each person applying therefor reasonably sufficient, adequate and efficient service upon terms as required by the commission. . ." In view of this language, the effect of what the regulated utilities are asking the Commission is to allow them to agree not to serve within certain areas when requested to do so by a person applying for electrical service, if that area is already served by another utility.

Admittedly, there is no statute which says that the Commission should divide the state into service areas as is done in the regulation of telephone, water and sewer utilities. However, it is the public policy of this state that cooperatives and municipalities are entities which may engage in the sale of electricity through the specific authorization of the Legislature of the State of Florida. The cooperatives engage in such activity not only because of authorization from the state, but also as the result of laws passed by the Congress of the United States. The inescapable conclusion is that it must be the public policy that cooperatives and municipalities are qualified to sell electricity in the geographical territories in which they operate.

Since this is the public policy, the Commission, even in view of Section 366.03, Florida Statutes, should not undertake to direct a utility under its jurisdiction (such as Florida Power Corporation or Florida Power and

Light Company) to render service in a territory already served or about to be served by a cooperative or a municipality. It is even wiser that the Commission and the utilities involved anticipate these conflicts as to areas of service and make effective some reasonable territorial agreement.

The advantages of having a territorial agreement are manyfold. If there is no agreement, there will be duplications of service as a result of unrestrained competition, which in turn has several undesirable results. Unrestrained competition leads to attempted preemption of areas by the premature erection of more lines than are needed for immediate service, which lessens the immediate return of the investment and, in effect, must be subsidized by other customers of the utility. It means duplication of facilities in the same public ways which results in neither utility being able to get a full return on its investment, to the detriment of other customers who, in effect, also subsidize such uneconomical operations. It requires more employees to be constantly in the competitive areas and consumes more time and energy in efforts to "out-sell" the competing utility. It makes for unsatisfactory customer relations in that the customer, being betwixt competing utilities, is drawn involuntarily into the competitive squabbles and must suffer the resulting service inefficiencies. It prevents the full development of the customer potential in the competitive area since knowledge that a full return is unobtainable tends to divert the activities necessary for such development to more profitable areas, all to the detriment of the customer, and accordingly, not in the public interest.

It is the intent of the Commission to approve only the geographical division of the territories involved in these agreements, and not to approve the agreements in any other regard. The exhibits indicating these divisions in each of the dockets are as follows:

(1) *7061-EU*—Applicant's Exhibit No. 1 and that portion of Exhibit No. 3, entitled Exhibit II,

North Boundary Line A and North Boundary Line B.

(2) *7420-EU*—Exhibit No. 1.

(3) *7421-EU*—Exhibit No. 1.

(4) *7422-EU*—Exhibit No. 3.

(5) *7423-EU*—Exhibits Nos. 1-6.

(6) *7424-EU*—Exhibit A. attached to the Amended Application.

The Commission is unable to approve the territorial agreement in Docket No. 7425-EU because the agreement is vague and indefinite. Therefore, in consideration thereof, it is

ORDERED by the Florida Public Utilities Commission that the applications in Dockets Nos. 7061-EU, 7420-EU, 7421-EU, 7422-EU, 7423-EU, and 7424-EU, seeking approval of territorial agreements, be and the same are hereby approved. It is further

ORDERED that the application for approval of the territorial agreement in Docket No. 7425-EU be and the same is hereby denied. It is further

ORDERED that neither Florida Power Corporation nor Florida Power and Light Company shall deviate from these territorial agreements without prior authority from the Commission.

By Order of Chairman Edwin L. Mason, Commissioner Jerry W. Carter and Commissioner William T. Mayo, as and constituting the Florida Public Utilities Commission, this 28th day of April, 1965.

(SEAL)

/s/ Bolling C. Stanley
Executive Secretary

Commissioner Mayo dissents in that he would not approve the territorial agreements.

APPENDIX F

BEFORE THE
FLORIDA PUBLIC SERVICE COMMISSION

Docket No. 881326-EI
Order No. 20808
Issued: 2-24-89

IN RE: PETITION OF FLORIDA POWER AND LIGHT COMPANY FOR A DECLARATORY STATEMENT REGARDING REQUEST FOR WHEELING.

The following Commissioners participated in the disposition of this matter:

MICHAEL MCK. WILSON, Chairman
THOMAS M. BEARD
BETTY EASLEY
GERALD L. GUNTER
JOHN T. HERNDON

DECLARATORY STATEMENT REGARDING WHEELING BY FLORIDA POWER AND LIGHT COMPANY

BY THE COMMISSION:

By petition filed October 11, 1988, Florida Power and Light Company (FPL) sought a declaratory statement regarding a request for wheeling.

Background

FPL has provided and currently provides electric service to the Union Carbide Linde Division air products plant at Mims, Florida. The plant is located in an area

served by FPL. By letter dated August 11, 1988, Union Carbide Corporation (Union Carbide) advised FPL of its request to Florida Power Corporation (FPC) to provide interruptible service to the Mims Plant and requested FPL to wheel the interruptible power from FPC. Both FPL and FPC informed Union Carbide they could not accede to the request.

On October 11, 1988, FPL filed a petition for declaratory statement with the Commission. Essentially, the request asked for a statement that said that Union Carbide's request of FPL to wheel power from FPC's territory to the Union Carbide plant in FPL's territory would be inconsistent with the State statutes governing the regulation of electric service to retail customers and with a territorial agreement approved by the Commission in Order No. 3799.

On November 14, 1988, Union Carbide filed a Motion to Dismiss the Petition of FPL. In summary, that motion urged the Commission to dismiss the petition for the following reasons; that it would be an abuse of the Commission's discretion to issue the statement given the pendency of a related anti-trust proceeding in United States District Court, *Union Carbide Corporation v. Florida Power & Light Company and Florida Power Corporation,* Civil Action 88-1622-CIV-T-13C (M.D. Fla., amended complaint filed October 18, 1988); that the petition asked the Commission to take action which was beyond the scope of its jurisdiction; and that the petition failed to allege Union Carbide's transmission request would produce the harmful effects arguably sought to be prevented by the statutory provisions which FPL invoked.

On November 29, 1988, FPL filed a Response to Union Carbide's Motion to Dismiss. That response stated: the pendency of the Union Carbide antitrust action underscores the need for Commission action on FPL's request for declaratory statements; Federal regulation of

the rates and terms and conditions of wheeling does not affect this Commission's authority to act on FPL's petition; and FPL has properly invoked this Commission's declaratory statement jursidiction.

On January 12, 1989, Union Carbide filed a Motion for Leave to File Reply to Response of FPL to Motion to Dismiss, and filed a Reply and a Request for Oral Argument. Union Carbide contended that FPL's response made it clear that the petition's real purpose is to secure this agency's involvement in resolving matters pending before a federal district court and this would constitute Commission "interference" with federal court responsibilities. Union Carbide also asserted that FPL's petition "would have this Commission attempt to obstruct the flow of power in interstate commerce by declaring that the requested transmission cannot occur unless certain state policies are satisfied." Union Carbide went on to argue that FPL's petition transgresses the "bright line" which separates federal and state jurisdiction; that FPL's Response, like its Petition, failed to show how Union Carbide's request could possibly harm any of the interests arguably protected by the statutes, and that FPL had to present evidence demonstrating a causal link between Union Carbide's request and reasonably expected impacts upon FPL. Union Carbide contended that FPL did not explain how the loss of interruptible load such as Union Carbide's could possibly affect the utility planning function, "particularly since a utility does not include interruptible demand in deciding whether to build new generation;" and that the territorial service agreement upon which FPL relies is itself the subject of a pending lawsuit in federal district court.

Other procedural actions in this case are the following:

—FPC filed an Amended Notice of Intervention on November 9, 1988, and requested that the Commission expedite these proceedings;

—Union Carbide filed a Response to FPC's Amended Notice on November 21, 1988;

—FPL filed a Motion for Extension of Time to Respond to Union Carbide's Motion to Dismiss on November 18, 1988;

—FPC filed on November 21, 1988, a Transcript of Hearing resulting in Commission Order 3799 approving territorial agreement;

—Union Carbide filed a Motion to Intervene January 18, 1989;

—FPC filed an Amended Notice of Supplemental Authority January 19, 1989.

Finally, on February 3, 1989, Union Carbide filed notice of its Withdrawal of the Motion to Intervene and its Request for Oral Argument. In doing so, Union Carbide asked that its Motion to Dismiss and its Reply to FPL's Response be treated by the Commission as *amicus* submissions and that the Commission "may consider or not consider then as it deems appropriate." The basis for Union Carbide's withdrawal, as stated in the Notice, was a concern that the "limited nature" of Union Carbide's intervention was ignored or misunderstood. Union Carbide had "consistently argued that the federal antitrust court is the only proper forum to adjudicate the issues raised by FPL and FPC, and it has simply sought the opportunity to argue the limited jurisdictional issues to the Commission."

The Commission acknowledges Union Carbide's Notice of Withdrawal of Intervention. As requested by Union Carbide, we will still take cognizance of the points raised and essentially will treat the filings as *amicus* submissions. Our ruling on the Petition effectively denies Union Carbide's Motion to Dismiss.

FPC's Intervention

We find it appropriate to allow FPC to intervene. Therefore, we will treat FPC's Notice of Intervention as a motion and grant the motion. Section 120.565, Florida

Statutes, states that a declaratory statement sets out the agency's opinion as to the applicability of a specified statutory provision of any rule or order of the agency "as it applies to the petitioner in his set of circumstances only." Thus, there is some question as to the need to allow intervention. Yet, here, FPC is part of the equation in the territorial agreement.

FPC, in its Amended Notice of Intervention, stated that on June 28, 1965, this Commission issued its Order No. 3799 approving a territorial agreement between FPL and FPC. That Order established service areas for the two utilities in certain geographic areas in which their service areas had begun to overlap. The FPC notice also described the Commission's active supervision of these service areas since their initial approval. Among other things, Order No. 3799 was modified by Commission Order No. 5255, dated October 29, 1971, to exclude from its effect the sale of bulk power supply for resale. Order No. 3799 was again modified by Commission Order No. 6184 dated June 28, 1974, to provide for minor adjustments to the boundary between the service territories in the Sanford, Seminole County, area. FPC points out that Union Carbide has not requested this Commission to modify Order No. 3799 to allow FPC to provide retail electric service to Union Carbide's Mims plant in Brevard County. Such action, in the absence of an appropriate modification to the terms of Order No. 3799, would "not only violate existing provisions of that Order, but would also create an unreasonable preference or advantage to Union Carbide in violation of Section 366.03, Florida Statutes," says FPC. FPC also urged the Commission to expedite these proceedings.

Union Carbide's response to FPC's Notice was that FPC's request should be dismissed because only the federal court can address and resolve the question of whether FPL and FPC are required to provide the service requested by Union Carbide.

FPC is appropriately before the Commission in this matter. Both the territorial agreement and the request for wheeling have a direct impact on FPC. However, there is no need to expedite these proceedings because this declaratory statement is independent of the federal case.

Commission's Discretion to Issue Declaratory Statement

In its Motion to Dismiss, Union Carbide raised several arguments as to why the Commission should not issue the statement. We believe that the Commission—while it has the discretion to refuse to entertain the Petition—is also not precluded from doing so.

There is an actual present practical need for the declaratory statement. Union Carbide has requested that FPC provide power to it and that FPL wheel the power to Union Carbide because FPC has no transmission facilities to serve Union Carbide. FPL's request is that the Commission clarify its rights and obligations under Florida law in responding to Union Carbide's, its customer's, stated intention of seeking service from another utility.

Union Carbide alleges that any harm FPL would face is merely speculative and that this "discrete transaction" would produce no harm. This allegation ignores the impact this transmission—if repeated—would have on the current regulatory scheme and the long-term harm to other utility ratepayers it would produce. As the Florida Supreme Court observed in *Storey v. Mayo,* 217 So.2d 304, 307 (Fla. 1968), the allowance of a customer's proposal might appear to benefit a few, but "the ultimate impact of repetition occurring many times in an extensive system-wide operation could be extremely harmful to the utility, its stockholders, and the great mass of its customers."

There is also a present ascertained state of facts with which the Commission should deal. Union Carbide has requested FPC provide power to it. Both FPC and FPL contend Union Carbide is located within FPL's territory,

which territory they contend was allocated to FPL in a territorial agreement approved by this Commission. FPL wants to know whether, under Florida law, it can be required to give up a customer within its territory. Further, can it be required to provide transmission service to Union Carbide in order for the customer to purchase electricity from another utility? Union Carbide has made a request for retail wheeling service from FPL. FPL wants to know if it can be compelled to provide that wheeling.

The declaratory statement would in no way "interfere with" a Federal District Court action or "trespass upon federal agency jurisdiction," as Union Carbide suggests. Here, the Commission is asked to interpret Florida statutes and Florida cases regarding territorial agreements which have long been established, monitored, and supported in this state. Federal law itself preserves this jurisdiction to states. As provided in FPC's Amended Notice of Supplemental Authority, 16 U.S.C. Section 824j(a), (b), (c)(3), and (4) provide that no order may be issued by FERC regarding certain wheeling authority which is "inconsistent with any State law which governs the retail marketing areas of electric utilities; and no order may be issued by FERC under this section providing for the transmission of electric energy directly to an ultimate consumer.

While the Federal District Court suit does involve the question of whether Union Carbide can get service from FPC rather than FPL, the suit asks for relief under federal anti-trust law, not Florida regulatory law. Such a federal issue would surely take years to make its way to the ultimate forum at the U.S. Supreme Court and would not be finally decided until that point. In the meantime, this Commission is being asked to address the interpretation and enforcement of the current regulatory scheme; a matter within its express statutory authority.

Here, we are presented questions that are entirely within our purview. We see no pre-emption by the Federal Energy Regulatory Commission over the retail delivery of energy to a Florida utility's customer. Also, the Commission is not being asked to address federal anti-trust issues. We believe it is appropriate for the Commission to proceed with clarifying the rights and obligations of the petitioner under Florida law. We do so independently and regardless of the federal suit.

Substantive Issues Raised by FPL's Petition

Specifically, FPL requests the issuance of declaratory statements that: FPL should not wheel power as requested because Union Carbide's proposal is inconsistent with section 366.04(3), and section 366.05(1), Florida Statutes (1987); Union Carbide's proposal is inconsistent with section 366.03, Florida Statutes (1987); the service contemplated by Union Carbide's proposal is inconsistent with the rights and obligations of FPL under its territorial agreement with FPC, with Order No. 3799 approving that agreement and with sections 366.04(2) and 366.05(1), Florida Statutes (1987); and FPL should not provide the retail wheeling services requested by Union Carbide unless it is cost-effective to FPL and its general body of ratepayers. Basically, FPL is seeking a statement that FPL is not required to wheel FPC's power to Union Carbide under Florida law and pursuant to its territorial agreement with FPC; and that Union Carbide's request is inconsistent with the State statutes governing the regulation of electric service to retail customers.

We determine that pursuant to the applicable Florida statutes and case law, FPL is not required to wheel the power as requested by Union Carbide when such wheeling contravenes the territorial agreement in effect between FPL and FPC, which has been approved by this Commission.

The statutory sections which provide the authority for territorial agreements and for the Commission's role in

such agreements are: Sections 366.03, 366.04(3), 366.05, and 366.04(2)(c), and (d), Florida Statutes. Section 366.03, Florida Statutes, sets forth the general duties of a public utility. These include the mandate that no public utility give "any undue or unreasonable preference or advantage" to any person or locality, or subject any person "to any undue or unreasonable prejudice or disadvantage." The Commission's jurisdiction over the "grid bill" is provided in section 366.04(3), Florida Statutes. It states that the Commission has authority over the "planning, development, and maintenance of a coordinated electric power grid throughout Florida to assure an adequate and reliable source of energy for operational and emergency purposes in Florida for the avoidance of further uneconomic duplication of generation, transmission, and distribution." Section 366.05, Florida Statutes, provides the Commission's power "to require repairs, improvements, additions, and extensions to the plant and equipment of any public utility when reasonably necessary . . . to secure adequate service." Section 366.04(2), Florida Statutes, describes the Commission's authority to require electric power conservation and reliability within a coordinated power grid, and to approve territorial agreements.

The Commission and the Florida Supreme Court have long recognized the value of territorial agreements because the agreements best serve the public interest in preventing duplication of facilities between electric utilities, and allow the utilities to make economical long-range plans for expansion of electric facilities necessary to serve customers in a geographically defined area.

As the Commission stated in Order No. 3799 issued in 1965, page 3:

> The advantages of having a territorial agreement are manyfold: If there is no agreement, there will be duplications of service as a result of unrestrained competition, which in turn has several undesirable

results. Unrestrained competition leads to attempted preemption of areas by the premature erection of more lines than are needed for immediate service, which lessens the immediate return of the investment and, in effect, must be subsidized by other customers of the utility. It means duplication of facilities in the same public ways which results in neither utility being able to get a full return on its investment, to the detriment of other customers who, in effect also subsidize such uneconomical operations. It requires more employees to be constantly in the competitive areas and consumes more time and energy in efforts to "out-sell" the competing utility. It makes for unsatisfactory customer relations in that the customer, being betwixt competing utilities, is drawn involuntarily into the competitive squabbles and must suffer the resulting service inefficiencies. It prevents the full development of the customer potential in the competitive area since knowledge that a full return is unobtainable tends to divert the activities necessary for such development to more profitable areas, all to the detriment of the customer, and accordingly, not in the public interest.

Policy and Practical Implications

While this declaratory statement deals with the petitioner in his particular set of circumstances, there are nevertheless policy and practical implications to the intention of a customer to choose its utility. We will describe these briefly.

Each utility within the State is under a statutory obligation to provide adequate generation, transmission, and distribution facilities to serve its existing customers and any future customers it can reasonably identify in a planning horizon.

The Commission has long recognized that in order to have effective planning each utility must identify the cus-

tomers it is obligated to serve. Territorial agreements set the boundaries that establish which utility is obligated to serve a new customer.

The relevant territorial agreement between FPL and FPC was approved by the Commission in Docket No. 7420-EU, Order No. 3799. FPL has been serving Union Carbide for sometime. To have Union Carbide switch to FPC would invite rate shopping throughout the state. This would create confusion as to who has the obligation to serve and how much generation each utility must maintain. This would limit the Commission's ability to maintain a coordinated electric power grid.

Florida Supreme Court Cases and Florida Statutes Regarding Territorial Agreements and Commission Authority

More than one statutory section has been relied on by the Florida Supreme Court in upholding these territorial agreements and in affirming the Commission's role in approving the agreements.

Storey v. Mayo, supra, is the seminal case in Florida in which the Florida Supreme Court held that a territorial agreement between two electric utilities was not invalid as being in restraint of trade, contrary to the public interest, or violative of equal protection.

The Court decried the situation created prior to territorial agreements. Prior to the agreement, the FPL and the City of Homestead actively competed for customers in the suburban areas. The Court noted, "This, of course, required duplicating, paralleling, and overlapping distribution systems in the affected areas." The duplication of lines, poles, transformers, and other equipment not only marred the appearance of the community but also increased the hazards of servicing the area.

The Court continued:

> Such overlapping distribution systems substantially increase the cost of service per customer because

> they simply mean that two separate systems are being supplied and maintained to serve an area when one should be sufficient. Obviously, neither system receives maximum benefit from its capital invested in the area. The ultimate effect of this is that the rates charged in the affected areas are necessarily higher, or alternatively, the customers in some other part of the system must help bear the added cost. *Id.* at 306.

In order to end the "unsatisfactory effects of this type of expensive, competitive activity," the City and the Company executed the service agreement which established areas of service around the City in the suburban territory.

The Court explained that service areas are not specifically controlled by requirement of certificates of public necessity and convenience:

> However, in some measure, the Commission does control the areas served by the companies by virtue of its prescribed powers, including the specified power ". . . to require repairs, improvements, additions, and extensions to the plant and equipment of any public utility reasonably necessary to promote the convenience and welfare of the public and secure adequate service or facilities for those reasonably entitled thereto . . .". Fla. Stat. § 366.05 (1967), F.S.A. *The regulatory powers of the Commission, as announced in the cited section, are exclusive and, therefore, necessarily broad and comprehensive.* (Emphasis supplied).
>
> *The powers of the Commission over these privately-owned utilities is omnipotent within the confines of the statute and the limits of organic law.* Because of this, the power to mandate an efficient and effective utility in the public interest necessitates a correlative power to protect the utility against unnecessary, expensive competitive practices. While in particular

> locales such practices might appear to benefit a few, the ultimate impact of repetition occurring many times in an extensive system-wide operation could be extremely harmful and expensive to the utility, its stockholders and the great mass of its customers. (Emphasis supplied). *Id.* at 307.

The Court relied primarily on section 366.05, Florida Statutes, regarding the Commission's power to require repairs, improvements, etc. to the plant of any public utility and to secure adequate service as the primary broad authority for its role in territorial agreements.

In *Utilities Commission of New Smyrna Beach v. Florida Public Service Commission,* 469 So.2d 731 (Fla. 1985), the Court reversed the Commission's use of a "substantial benefit to customers" standard in approving territorial agreements. However, the Court did not question the Commission's authority to approve territorial agreements. The Court relied on section 366.04(3), Florida Statutes, to conclude that the Commission has authority to determine these agreements based on a statutory mandate to avoid "further uneconomic duplication of generation, transmission, and distribution facilities," citing *Gainesville-Alachua County Regional Electric, Water & Sewer Utilities Board v. Clay Electric Coop.,* 340 So.2d 1159, 1162 (Fla. 1976). The Court emphasized, "We do not relegate the PSC to a 'rubberstamp' role in approving territorial agreements."

The Florida Supreme Court's most recent pronouncement on territorial agreements is *Lee County Electric Cooperative v. Marks,* 501 So.2d 585 (Fla. 1987). This case involved FPL's request for a declaratory judgment action to establish whether it had a statutory duty to serve a customer who constructed a transmission line to a point within FPL's territory. The Court re-emphasized the quote in *Storey v. Mayo* that "an individual has no organic, economic, or potential right to service by a particular utility merely because he deems it advantageous

to himself." The Court added—of great relevance to the matters at hand:

> Larger policies are at stake than one customer's self-interest, and those policies must be enforced and safeguarded by the PSC.

Thus, the Court again in 1987 looked to section 366.04 (3), Florida Statutes, for the Commission's duty regarding territorial agreements and regarding the validity of such agreements. Under that section, the Commission's duty is to police

> the planning, development, and maintenance of a coordinated electric power grid throughout Florida to assure . . . the avoidance of further uneconomic distribution facilities.

Lastly, the Commission's statutory authority to consider territorial agreements is derived, in part, from section 366.04(2)(c) and (d), Florida Statutes. These provide the following:

> (2) In the exercise of its jurisdiction, the Commission shall have power over rural electric cooperatives and municipal electric utilities for the following purposes:
>
> (c) to require electric power conservation and reliability within a coordinated grid, for operational as well as emergency purposes.
>
> (d) to approve territorial agreements between and among rural electric cooperatives, municipal electric utilities, and other electric utilities under its jurisdiction. However, nothing in this chapter shall be construed to alter existing territorial agreements as between the parties to such an agreement.

Facility Planning and Interruptible Service

Union Carbide states that because its load is interruptible, its load is not included in planning decisions. This

is technically correct; interruptible load is excluded when determining the timing for new generation facilities. However, for long-term system planning the utility includes this energy when deciding what type plant (oil, coal, nuclear, combined cycle, etc.) to build. This is done to assure that an optimal mix is attained for the benefit of the utility's ratepayers, including the interruptible customer. The utility must also make a commitment based on the capacity factor of the unit to acquire its fuel contracts. We find nothing inherent in the nature of interruptible service that would make it fall outside of, or transcend, the coverage of a territorial agreement.

In the declaratory statement, the Commission need not address whether the retail wheeling request by Union Carbide should not be provided unless cost-effective to FPL and its ratepayers. Under the Commission-approved territorial agreement, FPL, not FPC provides service to Union Carbide. The issue of whether retail wheeling is cost-effective to FPL and its customers assumes that FPC has the authority and obligation to serve Union Carbide, which it does not have.

In summary, territorial agreements approved by the Commission are fundamental to the integrity and reliability of electric service provided to the consumers in the State. Where Union Carbide has requested service from a utility located in and servicing another territory and has requested the host utility to wheel such power in contravention of a territorial agreement, we find the host utility is precluded from implementing such a request. It is inconsistent with the above-mentioned case law and statutes. It also has poor policy implications. A customer simply has no fundamental right to choose his or her utility regardless of territorial boundaries. Every residential customer might like a similar opportunity. Yet, such an opportunity cannot exist, within the current regulatory structure, and still maintain the viability and reliability of electric service in the State.

It is, therefore,

ORDERED by the Florida Public Service Commission that the Petition for Declaratory Statement is approved and it is determined that FPL should not wheel power as requested when such wheeling is in contravention of the territorial agreement for the reasons set forth in the body of this Order; and

ORDERED that the Notice of Intervention by FPC is granted.

By ORDER of the Florida Public Service Commission, this 24th day of FEBRUARY, 1989.

/s/ Steve Tribble
STEVE TRIBBLE
Director
Division of Records and Reporting

(SEAL)

CBM

Supreme Court, U.S.
FILED
APR 12 1996
CLERK

No. 95-1473

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

PRAXAIR, INC.,

Petitioner,

v.

FLORIDA POWER & LIGHT COMPANY and
FLORIDA POWER CORPORATION,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF FOR RESPONDENT FLORIDA POWER & LIGHT COMPANY IN OPPOSITION

Daniel M. Gribbon
James R. Atwood*
Robert A. Long, Jr.
COVINGTON & BURLING
1201 Pennsylvania Avenue, N.W.
P.O. Box 7566
Washington, D.C. 20044
(202) 662-6000

Counsel for Respondent Florida Power & Light Company

* Counsel of Record

April 1996

QUESTION PRESENTED

Whether an order of the Florida Public Service Commission dividing the retail service territories of two regulated electric utilities assigned Brevard County, Florida, to respondent Florida Power & Light Company.

PARTIES TO THE PROCEEDING AND RULE 29.6 LISTING

Petitioner Praxair, Inc., and respondents Florida Power & Light Company and Florida Power Corporation are the only parties to this action. The original plaintiff in this action was Union Carbide Corporation, a New York corporation. After Union Carbide filed this action, it created Praxair, Inc., by spinning off some of its assets. The district court subsequently entered an order substituting Praxair for Union Carbide as the party plaintiff.

The parent company of respondent Florida Power & Light Company is FPL Group, Inc. Florida Power & Light Company's subsidiaries, other than wholly-owned subsidiaries, are FPL Services, JEA 500 KV Transmission Line, Robert W. Scherer Electric Generating Plant — Unit #4, and St. Johns River Power Park.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING AND RULE 29.6 LISTING ii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 1

STATEMENT 2

REASONS FOR DENYING THE WRIT 7

CONCLUSION 14

TABLE OF AUTHORITIES

Page

Cases

324 Liquor Corp. v. Duffy, 479 U.S. 335 (1987) 8
Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328 (1990) 12
California Aviation, Inc. v. City of Santa Monica, 806 F.2d 905 (9th Cir. 1986) 12
California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97 (1980) . . . 4, 6
Columbia Steel Casting Co. v. Portland General Electric Co., 60 F.3d 1390 (9th Cir. 1995) 9, 10, 12
DFW Metropolitan Line Services v. Southwestern Bell Telephone Corp., 988 F.2d 601 (5th Cir.), *cert. denied*, 114 S. Ct. 183 (1993) 11, 12
Gulf Power Co. v. FPSC, 480 So. 2d 97 (Fla. 1985) 13
Lorrie's Travel & Tours, Inc. v. SFO Airporter, Inc., 753 F.2d 790 (9th Cir. 1985) 12
Mercy-Peninsula Ambulance, Inc. v. County of San Mateo, 791 F.2d 755 (9th Cir. 1986) 12
Municipal Utilities Board of Albertville v. Alabama Power Co., 21 F.3d 384 (11th Cir. 1994), *cert. denied*, 115 S. Ct. 1096 (1995) 11, 12
O'Brien v. Skinner, 414 U.S. 524 (1974) 8
PW Ventures, Inc. v. Nichols, 533 So. 2d 218 (Fla. 1988) 13, 14
Peoples Gas Sys., Inc. v. Mason, 187 So. 2d 335 (Fla. 1966) 5

Stinson v. United States, 508 U.S. 36 (1993) 7
Storey v. Mayo, 217 So. 2d 304 (Fla. 1968),
cert. denied, 395 U.S. 909 (1969) 5
Udall v. Tallman, 380 U.S. 1 (1965) 8
Washington v. Yakima Indian Nation,
439 U.S. 463 (1979) 12
Wisniewski v. United States, 353 U.S. 901 (1957) 12
*Yeager's Fuel, Inc. v. Pennsylvania Power &
Light Co.*, 22 F.3d 1260 (3d Cir. 1994) 8

Statutes & Rules

15 U.S.C. § 1 4
28 U.S.C. § 1254(1) 2
28 U.S.C. § 1292(b) 6
Fla. Stat. Ann. § 350.011 (West 1968) 2
Fla. Stat. Ann. § 366.04(2) (West 1996) 5
Fla. Stat. Ann. § 366.04(2)(e) (West 1996) 13
Fla. Stat. Ann. § 366.04(3) (West 1996) 5
Fla. Stat. Ann. § 366.04(5) (West 1996) 13
Fla. Stat. Ann. § 366.05(7) (West 1996) 5
Fla. Stat. Ann. § 366.05(8) (West 1996) 5
Eleventh Circuit Rule 35-6 2

Miscellaneous

Phillip E. Areeda & Herbert Hovenkamp,
Antitrust Law ¶ 212.4c (1995 Supp.) 12

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-1473

PRAXAIR, INC.,

Petitioner,

v.

FLORIDA POWER & LIGHT COMPANY and
FLORIDA POWER CORPORATION,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

BRIEF FOR RESPONDENT FLORIDA POWER & LIGHT COMPANY IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-9a) is reported at 64 F.3d 609. The district court's opinion and order denying the parties' cross-motions for summary judgment (Pet. App. 10a-28a), and its opinion and order denying the parties' cross-motions for reconsideration (Pet. App. 31a-33a), are unreported.

JURISDICTION

The court of appeals entered its judgment on September 19, 1995. The court of appeals denied a suggestion of

rehearing *en banc* on December 15, 1995. Pet. App. 29a-30a. Pursuant to Eleventh Circuit Rule 35-6, a suggestion of rehearing *en banc* is also treated as a petition for rehearing before the original panel. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATEMENT

1. Respondents Florida Power & Light Company ("FPL") and Florida Power Corporation ("FPC") are regulated electric utilities engaged in the generation, distribution, and sale of electricity in different parts of Florida. This case concerns the interpretation of a 1965 order of the Florida Public Service Commission ("FPSC" or "Commission").[1] The FPSC's Order No. 3799, issued in 1965, expressly approved a division of retail service areas between FPL and FPC. Both the FPSC and the court of appeals below determined that Order No. 3799 allocated Brevard County to FPL's service area, whereas petitioner argues that it did not.

The purpose of Order No. 3799 "was to avoid duplication of service in areas of the state where there was significant population growth and where the utilities' service areas were converging." Pet. App. 5a. The Commission concluded that "unrestrained competition in those areas would be inefficient and uneconomical both for the utilities and [their] customers." *Id.* at 6a.

Order No. 3799 approved a division of service areas as shown by a red line drawn on a composite map. The red line "commenced at the northwestern corner of Volusia County . . ., meandered eastward between Volusia and Seminole Counties, and continued southward along the border

---

[1] The FPSC formerly was known as the Florida Public Utilities Commission. See Fla. Stat. Ann. § 350.011 (West 1968). For convenience, it is referred to by its current name throughout this brief.

between Orange, Osceola and Brevard Counties. The line terminated at the southernmost point of Brevard County." Pet. App. 6a. The composite map comprised highway maps of Volusia, Seminole, Orange, and Osceola Counties. Although "[n]o map was submitted specifically for Brevard County," "Brevard County was shown on both maps," and the red boundary line "ran along the entire Brevard County line." *Id.* at 6a.

Prior to issuing Order No. 3799, the FPSC held a public hearing, at which witnesses testified that areas to the east of the red boundary line were to be served by FPL, while areas to the west of the line were to be served by FPC. Pet. App. 6a, 13a. The witnesses explained that the boundary line was needed because the two systems were growing together in Volusia and Seminole Counties, and "to a lesser, but nevertheless important degree," in the Orange-Brevard and Osceola-Brevard areas. *Id.* at 7a, 13a. The witnesses testified that the boundary line had not been extended further to the north or south because there was no prospect of competition between FPL and FPC in those areas. *Id.* at 13a.

FPL was already serving Brevard County, including the town of Mims, when the Commission issued Order No. 3799 in 1965. In the 30 years that have followed, the Commission and respondents consistently "have treated Mims as part of Florida Power & Light's service territory." Pet. App. 8a. During the 1980s, the Commission conducted a comprehensive review of approved territorial agreements that placed Brevard County within FPL's service area. *Id.*

2. Petitioner Praxair, Inc., operates an industrial gas plant in the town of Mims. FPL has supplied electricity to Praxair's plant since it opened in 1965. In 1987, Praxair became dissatisfied with the rates it was paying for electricity, and sought to obtain a special reduced rate from FPL. FPL asked the FPSC to approve a special rate for Praxair, but the

FPSC denied the request in April 1988, on the ground that a special rate would effectively require FPL's other customers to subsidize service to Praxair. Pet. App. 2a-3a, 15a.

In August 1988, Praxair asked FPC to sell it electricity, and asked FPL to "wheel" (*i.e.*, transmit) the electricity across FPL's power lines to Praxair's plant. FPL and FPC independently declined to comply with this request, on the ground that it would violate Order No. 3799. Pet. App. 15a.

FPL promptly asked the Commission to decide whether compliance with Praxair's request would violate Order No. 3799. In February 1989, the Commission issued a declaratory statement that compliance with Praxair's request would violate Order No. 3799. Pet. App. 7a, 16a.

Praxair filed this action in October 1988, alleging that respondents had violated Section 1 of the Sherman Act, 15 U.S.C. § 1, by entering into an agreement to divide service territories. Respondents moved for summary judgment on the ground that their conduct, pursuant to Order No. 3799, was protected under the state-action doctrine. The FPSC filed a brief as *amicus curiae* in support of respondents. Praxair also moved for summary judgment on the state-action issue.

3. The district court (M.D. Fla., Nimmons, J.) denied the cross-motions for summary judgment. Pet. App. 10a-28a. The court noted that private conduct is immune from antitrust attack if (1) "the challenged restraint on competition is one 'clearly articulated and affirmatively expressed as state policy' and (2) . . . 'the policy [is] actively supervised by the State itself.'" Pet. App. 17a (quoting *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980)). The district court held that Order No. 3799 satisfies both prongs of the *Midcal* test.

The court held that the "clear articulation" requirement is satisfied because Florida "has demonstrated its intent to

displace competition in the field of retail electric service with a regulatory mechanism to designate territorial boundaries." Pet. App. 20a. Florida statutes grant the FPSC broad authority to review and approve territorial agreements, and to resolve territorial disputes on its own motion or in response to a petition by a utility. Pet. App. 18a-19a (citing Fla. Stat. Ann. §§ 366.04(2), 366.04(3), 366.05(7)-(8) (West 1996)). The Florida Supreme Court has interpreted these statutes as authorizing the FPSC to exercise "comprehensive control over competition among retail utility service providers." Pet. App. 19a (citing *Storey v. Mayo*, 217 So. 2d 304, 307 (Fla. 1968), *cert. denied* 395 U.S. 909 (1969)). And the FPSC "has stated on many occasions that its supervision of territorial agreements among utilities is intended to eliminate the harmful effects of unrestrained competition . . . ." Pet. App. 19a.

The court held that the "active supervision" requirement is satisfied because the FPSC exercises "extensive control over the validity and effect" of agreements dividing service territories. Pet. App. 27a. The Commission held a public hearing on respondents' application for a territorial division, "at which witnesses testified and the public participated." Pet. App. 26a. Following the hearing, the Commission approved the application by written order that expressly maintained continuing jurisdiction over modifications to the order. *Id.*

The district court nevertheless denied summary judgment on the state-action issue. The court relied on a statement in a subsequently-reversed order of the Commission for the proposition that territorial boundary lines "allocat[e] territory in areas where competition between utilities is expected." Pet. App. 23a (quoting FPSC Order No. 3835 (June 24, 1965), *reversed, Peoples Gas Sys., Inc. v. Mason*, 187 So. 2d 335, 337 (Fla. 1966)). The district court concluded that Order No. 3799 was not dispositive because there was a disputed issue of material fact as to "whether Mims was located in an area to the east of the boundary line in which competition between

FPL and FPC was reasonably foreseeable in the future." Pet. App. 24a. Accordingly, the district court denied the motions for summary judgment.

Both petitioner and respondents sought reconsideration. The district court denied the motions for reconsideration in a brief order. Pet. App. 31a-33a. Petitioner and respondents both appealed; the FPSC and the Attorney General of Florida filed briefs as *amici curiae* in support of respondents.

4. A unanimous panel of the court of appeals (Cox, *Roney*, and Wood) reversed.[2] The court of appeals agreed with the district court that both prongs of the *Midcal* test are satisfied in this case. Florida "has effectively displaced competition between electric utilities in the retail market," and has "'a clearly articulated and affirmatively expressed state policy' to regulate retail electric service areas." Pet. App. 4a (quoting *id.* at 18a). In addition, "'the Commission's extensive control over the validity and effect of [territorial] agreements negates any inference that the privately initiated agreements lack state supervision.'" Pet. App. 4a (quoting *id.* at 27a).

The court of appeals held that the district court had erred in concluding that there is a disputed question of material fact as to whether Mims is covered by Order No. 3799. In so holding, the court focused on "two factual inquiries": (1) "events surrounding the Commission's approval of the territorial agreements that resulted in Order No. 3799 in 1965," and (2) "the parties' actions since the 1965 order, which culminated in the Commission's 1989 declaratory statement interpreting that order." Pet. App. 5a.

---

[2] The court of appeals asserted jurisdiction both by reason of the district court's certification pursuant to 28 U.S.C. § 1292(b) and by reason of the collateral-order doctrine. See Pet. App. 2a.

As to the first inquiry, the court concluded that "[a] logical interpretation" of Order No. 3799 "is that Brevard County was included," because the Order established "a two-sided, east-west division." Pet. App. 7a. The court concluded that this interpretation is "confirm[ed]" by testimony at the public hearing that "the area east of the boundary, which encompassed only Brevard County, belonged to FPL." Pet. App. 7a-8a.

As to the second inquiry, the court observed that "[a]n agency's interpretation of its own regulations must be given controlling weight unless that interpretation is plainly erroneous or inconsistent with the regulation." Pet. App 8a (citing *Stinson v. United States*, 508 U.S. 36, 45 (1993)). The court of appeals noted that for 30 years the FPSC has treated Mims as part of FPL's service territory. The FPSC included Brevard County within FPL's service area in a comprehensive review of approved territorial agreements in the 1980s. And in its 1989 declaratory statement, the Commission "reasonably interpreted the prior agreement to allocate Brevard County to Florida Power & Light." Pet. App. 8a.

REASONS FOR DENYING THE WRIT

1. Petitioner misreads the court of appeals' decision and, as a result, frames a question that is not presented by this case. Petitioner asserts that the court of appeals held that "a state agency may retroactively confer antitrust immunity under the state action doctrine upon past private anticompetitive conduct." Pet. i. The court of appeals held no such thing. Instead, that court held that respondents' conduct was immunized by Order No. 3799, which was issued many years prior to the conduct at issue in this case. The court of appeals went on to observe that its interpretation of Order No. 3799 is confirmed by the Commission's interpretation of its own Order over a period of 30 years. The court of appeals

certainly did not hold that respondents' conduct was retroactively immunized by the Commission.

In interpreting Order No. 3799, the court of appeals first looked to the text of the Order and concluded that "[a] logical" and "entirely plausible and reasonable" interpretation is that the Order assigns Brevard County to FPL's service area. Pet. App. 7a. The court of appeals added that this interpretation is "confirm[ed]" by testimony during the public hearings on Order No. 3799. *Id.* at 8a. The court thus indicated that the text of the Order and the record of the public hearing are sufficient to decide this case.

As an additional basis for its holding, the court of appeals applied the settled principle that an "agency's interpretation of its own regulations must be given controlling weight unless that interpretation is plainly erroneous." Pet. App. 8a. See *Udall v. Tallman*, 380 U.S. 1 (1965); *Yeager's Fuel, Inc. v. Pennsylvania Power & Light Co.*, 22 F.3d 1260, 1268 (3d Cir. 1994); *cf. 324 Liquor Corp. v. Duffy*, 479 U.S. 335, 344 n.6 (1987) (quoting *O'Brien v. Skinner*, 414 U.S. 524, 531 (1974) (A federal court in applying the state-action doctrine may not "construe a state statute contrary to the construction given it by the highest court of a State.")). Applying this principle, the court of appeals concluded that the Commission's consistent practice, over a period of more than 30 years, of interpreting its own Order to include Brevard County, further supports respondents' interpretation of the Order. Pet. App. 8a. Petitioner is thus incorrect in asserting (Pet. 13) that the court of appeals concluded that "judgment could not be granted to the utilities based upon" Order No. 3799. Pet. 13. The court of appeals relied on the Commission's post-1965 actions as aids to *interpretation* of Order No. 3799, not as freestanding grants of retroactive antitrust immunity. See Pet. App. 8a (1989 declaratory statement "specifically found" that FPL "could not wheel power to Praxair *because it would be in contravention of the*

approved territorial agreement"); *id.* (1989 declaratory statement "*reasonably interpreted the prior agreement* to allocate Brevard County to Florida Power & Light") (emphasis added).[3]

In short, the court of appeals did not conclude that the Commission had conferred retroactive antitrust immunity; instead, it simply cited in support of its conclusion the agency's reasonable interpretation of its own prospective order. The court of appeals conclusion that Order No. 3799 assigns Brevard County to FPL's service area is correct. In any event, that factbound question plainly merits no further review.

2. There is manifestly no conflict between the decision in this case and the decision in *Columbia Steel Casting Co. v. Portland General Electric Co.*, 60 F.3d 1390 (9th Cir. 1995). In *Columbia Steel*, the court of appeals held that a 1972 order of the Oregon Public Utility Commission ("PUC") approved exclusive service areas, and thus conferred state-action immunity on the conduct at issue, even though the PUC's order on its face approved only a one-time exchange of

---

[3] Petitioner acknowledges (Pet. 2) that it does not dispute any of the material facts in this case, but invokes the principle that all reasonable inferences from those facts should have been drawn in its favor on summary judgment. See also *id.* at 10 n.5. The court of appeals' opinion does not indicate that it refused to draw reasonable inferences in petitioner's favor. In any event, the interpretation of Order No. 3799 is an issue of (state) law that can appropriately be decided on summary judgment. Indeed, petitioner has recognized throughout this litigation that the state-action issue was appropriately resolved, one way or the other, on summary judgment. See Pet. 7 (agreeing that "issue should be decided based upon available documentary evidence"); Pet. C.A. Opening Br. 13 ("No jury demand has ever been made in this case, and there is no need for a trial to determine what was submitted to the Commission and approved in 1965. . . . The *only* thing needed to resolve this case is to review the paper record . . ..") (emphasis in original).

customers and properties. The court of appeals acknowledged that the PUC's order "never uses the term 'exclusive territory,'" does not refer to the relevant provisions of state law, and may have been "intentionally made ambiguous" to deflect opposition to a division of service areas. *Id.* at 1396-97, 1398. The court of appeals nevertheless applied a "liberal 'foreseeability' standard" and concluded that the creation of exclusive service areas was a foreseeable result of the state agency's order. *Id.* at 1396. The court reasoned that the order "was desirable largely because it eliminated the need for duplicate poles, lines and other facilities in each territory," and this benefit would be lost if the order were not interpreted as creating exclusive service areas. *Id.* at 1397.

This brief description is sufficient to show that *Columbia Steel* does not conflict with the decision in this case. *Columbia Steel* was a considerably *closer* case on the state-action issue, and yet the Ninth Circuit decided in favor of the utilities. Petitioner's assertion of a conflict is based entirely on a footnote in the Ninth Circuit's opinion, which declined to consider "the PUC's retroactive amendment of its 1972 Order in 1992" in interpreting the 1972 Order. See Pet. 11, 12-13, 15 (citing 60 F.3d at 1398 n.7); see also 60 F.3d at 1394 (In 1992, PUC "amended its 1972 Order, *nunc pro tunc*."). Because the FPSC did not purport to amend Order No. 3799 retroactively, the Ninth Circuit's refusal to consider the Oregon PUC's retroactive amendment cannot possibly be viewed as creating a conflict in the circuits.[4]

Petitioner also misreads two other cases that it cites as examples of decisions allowing States to confer retroactive

---

[4] Elsewhere in its opinion, the Ninth Circuit expressly reserved decision on the utility's other arguments concerning the legal effect of the PUC's 1992 order, "[b]ecause we reverse on the basis of our reading of the 1972 Order." 60 F.3d at 1397 n.5.

immunity for private conduct. The first case, *Municipal Utilities Board of Albertville v. Alabama Power Co.*, 21 F.3d 384 (11th Cir. 1994), *cert. denied*, 115 S. Ct. 1096 (1995), did not address retrospective antitrust immunity at all. Instead, it held that there can be no *prospective* immunity for unsupervised conduct. In *Municipal Utilities Board*, the Alabama legislature enacted two statutes incorporating territorial agreements between two suppliers of electricity. There was no suggestion that the utilities enjoyed antitrust immunity for conduct undertaken prior to enactment of the statutes. Instead, the issue before the court was whether the agreements failed to qualify for state-action immunity because the statutes gave the utilities unsupervised power to allocate new customers among themselves. The court interpreted the statutes to require that "the Alabama Legislature must explicitly approve any customer allocations the parties might wish to make," and held that this interpretation was necessary to confer state-action immunity. *Id.* at 387.

In *DFW Metro Line Services v. Southwestern Bell Telephone Corp.*, 988 F.2d 601 (5th Cir.), *cert. denied*, 114 S. Ct. 183 (1993), the court of appeals, in concluding that the state agency had actively supervised the conduct at issue, noted that "while this suit was pending, the PUC was adjudicating the *very same issues presented in the instant case*." *Id.* at 606-07 (emphasis in original). The court concluded that "[i]t is ludicrous, almost to the point of frivolity, for Metro to contend that the PUC does not actively supervise the conduct in question given the fact that Metro and Bell are awaiting a PUC decision on Bell's actions 'as we speak.'" *Id.* at 607. The court of appeals' reliance on a pending state agency proceeding as evidence of continuing active supervision is a far cry from a holding that state agencies may confer retroactive antitrust immunity.

In sum, petitioner's discussion of a "different model of the state action doctrine" (Pet. 16) is a straw man based on a

misreading of *Municipal Utilities Board, DFW Metro Line Services*, and the decision in this case. Accordingly, further review is not warranted.[5]

3. The court of appeals' decision is correct for an additional reason not reached by the court below. See *Washington v. Yakima Indian Nation*, 439 U.S. 463, 476 n.20 (1979) (prevailing party may defend judgment on any ground properly raised below). As FPL argued below (see FPL C.A. Br. as Cross-Appellee 36-40), Florida law would have prohibited FPC from serving Praxair even in the absence of an approved territorial agreement. Consequently, respondents could not show any antitrust injury. See *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 344 (1990) (describing antitrust injury requirement).

Florida's regulatory policy prohibits retail competition between utilities irrespective of any territorial agreement. The Commission is authorized to resolve, on its own motion if necessary, "any territorial dispute involving service areas," and is directed to exercise its regulatory powers to avoid

---

[5] In *California Aviation, Inc. v. City of Santa Monica*, 806 F.2d 905, 909 (9th Cir. 1986), the Ninth Circuit held that the California legislature conferred state-action immunity on conduct that occurred 16 years prior to enactment of the legislation, by recognizing and affirming a pre-existing state policy. The Ninth Circuit reached similar results in *Mercy-Peninsula Ambulance, Inc. v. County of San Mateo*, 791 F.2d 755, 757 n.1, 758 n.2 (9th Cir. 1986), and *Lorrie's Travel & Tours, Inc. v. SFO Airporter, Inc.*, 753 F.2d 790. 793 (9th Cir. 1985). These decisions need not be viewed as conflicting with the Ninth Circuit's *Columbia Steel* decision. See Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 212.4c, at 192 (1995 Supp.) ("statute that purports to 'clarify' and endorses an authorization reasonably implicit in pre-existing statutes or court decisions may help support a finding that the challenged conduct was authorized when it occurred"). To the extent that the decisions of the Ninth Circuit are in tension, however, that intra-circuit tension does not warrant the attention of this Court. See *Wisniewski v. United States*, 353 U.S. 901 (1957).

"uneconomic duplication of generation, transmission, and distribution facilities." Fla. Stat. Ann. § 366.04(2)(e), (5) (West 1996). The FPSC consistently has exercised its authority to prohibit utilities from serving potential customers located in an area served by another utility, even where no territorial agreement barred such service.[6] As the Commission explained in its brief filed in the court of appeals:

> If Praxair were to prevail in this action, the court either would have to order FPC to construct duplicative distribution lines to the Mims plant, or order FPL to wheel FPC's power to the plant through FPL's distribution system. Neither remedy is available under Florida law. The State of Florida does not permit "uneconomic duplication of facilities." . . . The system of electric service territories is specifically designed to prevent that problem. Nor does the State permit retail wheeling. . . . Both remedies invite rate shopping throughout the State and would cause disruption, discrimination, and inefficiencies in the electric utility industry in Florida.

FPSC C.A. Br. 20 (citations omitted).

The Florida Supreme Court addressed an analogous situation in *PW Ventures, Inc. v. Nichols*, 533 So. 2d 218 (Fla. 1988), where a cogeneration facility sought to serve a major customer already served by FPL. The court ruled that the cogenerator's proposal "to go into an area served by a utility and take one of its major customers" (*id.* at 283) was prohibited by Florida law. The court observed that if state law permitted "cherry picking" of large industrial customers, the lost revenue "would have to be made up by the remaining

---

[6] See, *e.g.*, FPSC Order No. 13668 (1994), *aff'd*, *Gulf Power Co. v. FPSC*, 480 So. 2d 97 (Fla. 1985); Order No. 16106 (1986); Order No. 12324 (1983).

customers of the regulated utilities since the fixed costs of the regulated systems would not have been reduced." *Id.*

Accordingly, petitioner would have suffered no antitrust injury even if Order No. 3799 had not allocated Brevard County to FPL.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

Daniel M. Gribbon
James R. Atwood*
Robert A. Long, Jr.
COVINGTON & BURLING
1201 Pennsylvania Avenue, N.W.
P.O. Box 7566
Washington, D.C. 20044
(202) 662-6000

Counsel for Respondent
Florida Power & Light
Company

April 1996

* Counsel of Record

(3)

Supreme Court, U.S.
FILED

APR 12 1996

CLERK

No. 95-1473

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

PRAXAIR, INC.,

Petitioner,

v.

FLORIDA POWER & LIGHT COMPANY and
FLORIDA POWER CORPORATION,

Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

BRIEF FOR RESPONDENT FLORIDA POWER CORPORATION IN OPPOSITION

Alan C. Sundberg*
Gary L. Sasso
Ronald J. Tenpas
CARLTON, FIELDS, WARD,
EMMANUEL, SMITH & CUTLER, P.A.
One Progress Plaza
200 Central Ave., Suite 2300
St. Petersburg, Florida 33701
Telephone: (813) 821-7000
Facsimile: (813) 822-3768
Counsel for Respondent
Florida Power Corporation
* Counsel of Record

April 12, 1996

13 pp

QUESTION PRESENTED

Whether an order of the Florida Public Service Commission dividing the retail service territories of two regulated electric utilities assigned Brevard County, Florida, to respondent Florida Power & Light Company.

PARTIES TO THE PROCEEDING AND RULE 29.6 LISTING

Florida Progress Corporation -- Parent Company to respondent Florida Power Corporation

Florida Power Corporation -- respondent

Florida Power Corporation has no subsidiaries that are not wholly owned.

TABLE OF CONTENTS

Page

QUESTION PRESENTED . . . . . (i)

PARTIES TO THE PROCEEDING AND RULE 29.6 LISTING . . . . . (ii)

TABLE OF AUTHORITIES . . . . . (iv)

OPINIONS BELOW . . . . . -1-

JURISDICTION . . . . . -2-

STATEMENT . . . . . -3-

REASONS FOR DENYING THE WRIT . . . . . -4-

CONCLUSION . . . . . -6-

TABLE OF AUTHORITIES

Cases — Page

Columbia Steel Casting Co., Inc. v. Portland General Electric Co., 60 F.3d 1390 (9th Cir. 1995) . . . . . -4-

Stinson v. United States, __ U.S. __, 113 S.Ct. 1913 (1993) . . . . . -5-

Udall v. Tallman, 380 U.S. 1 (1965) . . . . . -5-

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-9a) is reported at 64 F.3d 609. The district court's opinion and order denying the parties' cross-motions for summary judgment (Pet. App. 10a-28a), and its opinion and order denying the parties' cross-motions for reconsideration (Pet. App. 31a-33a), are unreported.

JURISDICTION

The court of appeals entered its judgment on September 19, 1995. The court of appeals denied a suggestion of rehearing en banc on December 15, 1995. Pet. App. 29a-30a. Pursuant to Eleventh Circuit Rule 35-6, a suggestion of rehearing en banc is also treated as a petition for rehearing before the original panel. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATEMENT

To avoid unnecessarily burdening the Court with repetitive submissions, respondent Florida Power Corporation adopts the statement contained in the brief in opposition submitted by co-respondent Florida Power & Light.

REASONS FOR DENYING THE WRIT

Respondent Florida Power Corporation fully concurs with the reasons for denying the writ contained in the brief in opposition submitted by co-respondent Florida Power & Light and hereby adopts those arguments. Respondent Florida Power Corporation wishes to make one additional point not raised in the response of its co-respondent.

As explained by co-respondent Florida Power & Light, the Eleventh Circuit appropriately concluded that the correct reading of the Florida Public Service Commission's 1965 order is that the order allocates Brevard County to Florida Power & Light. As co-respondent also further points out, the Eleventh Circuit buttressed this conclusion with an alternative holding grounded in the Florida Public Service Commission's subsequent interpretation and implementation of its 1965 order. It is this latter analysis to which petitioner points in asserting a supposed conflict with the Ninth Circuit's holding in *Columbia Steel Casting Co., Inc. v. Portland General Electric Co.*, 60 F.3d 1390 (9th Cir. 1995).

Florida Power Corporation would note that, in taking account of subsequent Commission pronouncements and activity, the alternative portion of the Eleventh Circuit's analysis -- far from creating a split -- actually is in direct accord with the Ninth Circuit's review in *Columbia Steel*. Thus, in *Columbia Steel*, the Ninth Circuit concluded that a 1974 order of the Oregon utility commission provided an "authoritative clarification" of the original intent to establish exclusive territories through its initial 1972 order. The Ninth Circuit further buttressed this conclusion through reference to "consistent" utility commission orders from throughout the 1973-79 period. *Id.* at 1398.

This is fully consistent with the Eleventh Circuit's approach and with this Court's controlling authority. As set out more fully in co-respondent's brief, the Eleventh Circuit initially concluded that the "entirely plausible and reasonable explanation" of the initial 1965 Florida Public Service Commission order was

that the order allocated Brevard County to Florida Power & Light. The fact that the Eleventh Circuit then also looked at "30 years" of subsequent Commission practice, including the Commission's six year "comprehensive review of approved territorial agreements," merely serves to demonstrate the common approach shared by the two circuits, whereby each court recognized that an agency's interpretation of its own order is entitled to substantial deference. Indeed, the Eleventh Circuit's concluding comments that, in light of the Commission's own historic practice and interpretation, "the Commission reasonably interpreted the prior agreement to allocate [Brevard to Florida Power & Light]," illustrates that the Eleventh Circuit was using evidence of the Commission's practice and interpretation in the precise manner endorsed in *Columbia Steel*, i.e. as an interpretive aid that served simply to further confirm the court's initial interpretation of the 1965 order.

Not only is there no conflict with *Columbia Steel*, such an approach is entirely proper. It effectively implements the well-recognized principle that the courts must respect an agency's reasonable interpretation of its order, especially when such interpretation has been repeatedly confirmed, thereby inducing reliance by private parties. *Udall v. Tallman*, 380 U.S. 1, 4, 16-17 (1965); *Stinson v. United States*, __ U.S. __, 113 S.Ct. 1913, 1919 (1993).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

Alan C. Sundberg*
Gary L. Sasso
Ronald J. Tenpas
CARLTON, FIELDS, WARD,
EMMANUEL, SMITH & CUTLER, P.A.
One Progress Plaza
200 Central Ave., Suite 2300
St. Petersburg, Florida 33701
Telephone: (813) 821-7000
Facsimile: (813) 822-3768

Counsel for Respondent
Florida Power Corporation

* Counsel of Record

April 12, 1996

Supreme Court, U.S.
FILED
APR 22 1996

No. 95-1473

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

PRAXAIR, INC.,
Petitioner,

v.

FLORIDA POWER & LIGHT COMPANY AND
FLORIDA POWER CORPORATION,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

PETITIONER'S REPLY BRIEF

CARTER G. PHILLIPS
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 736-8000

NATHAN P. EIMER
CONSTANTINE L. TRELA, JR.*
DAVID D. MEYER
SIDLEY & AUSTIN
One First National Plaza
Chicago, Illinois 60603
(312) 853-7000

Counsel for Petitioner

* Counsel of Record

April 22, 1996

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF AUTHORITIES

CASES Page

Columbia Steel Casting Co. v. *Portland General Electric Co.*, 60 F.3d 1390 (9th Cir. 1995) 1, 4, 5, 6, 7
Stinson v. *United States*, 113 S. Ct. 1913 (1993) 4, 9
Udall v. *Tallman*, 380 U.S. 1 (1965) 4
Warrior Tombigbee Transp. Co. v. *M/V Nan Fung*, 695 F.2d 1294 (11th Cir. 1983) 3
Wilson v. *Arkansas*, 115 S. Ct. 1914 (1995) 8

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-1473

PRAXAIR, INC.,

Petitioner,

v.

FLORIDA POWER & LIGHT COMPANY AND
FLORIDA POWER CORPORATION,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

PETITIONER'S REPLY BRIEF

In their briefs in opposition, respondents do not attempt to argue that a state agency may retroactively confer antitrust immunity upon past anticompetitive conduct. Nor do they directly take issue with petitioner's contention that such a proposition would conflict with the Ninth Circuit's decision in *Columbia Steel Casting Co.* v. *Portland General Electric Co.*, 60 F.3d 1390 (9th Cir. 1995), and with the rationale for the state-action immunity doctrine articulated by this Court. Instead, respondents contend, somewhat surprisingly, that the Eleventh Circuit's decision in this case did not embrace such a proposition. Respondents' attempt to explain away the conflict by recasting the Eleventh Circuit's decision is, however, refuted by the opinion below.

1. Respondents' principal contention is that the Eleventh Circuit's opinion rests on a factbound determination that the Florida Public Service Commission ("the Commission") approved respondents' territorial allocation of Brevard County in 1965. Respondents contend that the Eleventh Circuit's reference to the Commission's post-1965 statements and actions was intended merely as "an aid to interpretation" of the 1965 Order, *see* FPL Opp. at 8, or as an "alternative holding" in support of summary judgment, *see* FPC Opp. at 4. Respondents' characterizations of the decision below, however, cannot be squared with the Eleventh Circuit's own explanation of its holding.

The Eleventh Circuit began its analysis by stating that "[t]he question presented is whether, in the [Commission's 1965] order approving the territorial agreement *or in events since that time*, there has been sufficient 'state action' by the Florida Public Service Commission which would allow FPC and FPL to divide service territories in Brevard County . . . ." 64 F.3d at 611, App. 3a (emphasis in original). The court of appeals noted that the district court had denied the parties' cross-motions for summary judgment "on the ground that there was a disputed issue of material fact concerning whether Mims [the site of petitioner's plant] is located in the area covered by the approved [1965] agreement." 64 F.3d at 612, App. 4a-5a. The Commission's 1965 Order, after all, purportedly concerned utility service only in four named Florida counties *other than* Mims' Brevard County, and had been issued upon notice only to officials in the four named counties and only following assurances by the utilities that the proposed territorial agreement was "not comprehensive" and left "unresolved" the question of how to allocate territories elsewhere. *See* Pet. 3-5 & n.1.

The court of appeals did not purport to resolve this "disputed issue of material fact" on appeal. Nor, given the state of the record, could it have done so against

petitioner. To be sure, the court stated its belief that it was "entirely plausible" and "[a] logical interpretation" of the 1965 Order to infer that Brevard County was impliedly allocated to FPL by the Commission in 1965. 64 F.3d at 613, App. 7a. The court also opined that its review of testimony offered during the public hearing that preceded the 1965 Order "confirm[ed]" the reasonableness of this inference. *Id.* But the court of appeals pointedly did not hold that its reading of the record was the *only* reasonable or plausible one and, as the Eleventh Circuit elsewhere has noted, "[i]f reasonable minds might differ on the inferences arising from undisputed facts, then the court should deny summary judgment." *Warrior Tombigbee Transp. Co.* v. *M/V Nan Fung*, 695 F.2d 1294, 1296-97 (11th Cir. 1983).

Thus, the court of appeals did not reverse the district court's denial of summary judgment based upon an appellate resolution of the "disputed issue of material fact" concerning the intended scope of the 1965 Order. Rather, the court reversed the district court based upon its determination that that factual issue was ultimately immaterial. "In our judgment," the court of appeals explained, "the district court erroneously focused primarily on the utilities' and Commission's intent in the original proceedings which culminated in the 1965 approval order, and did not give proper consideration to the parties' conduct and the Commission activity since that time." 64 F.3d at 612, App. 5a. The Eleventh Circuit thus expressly held that whether the State approved the private allocation of Brevard County to FPL in 1965 was *not dispositive*, and that the Commission's subsequent approval could suffice to confer immunity. On the basis of the court's assessment of the evidence concerning the subsequent approval —in particular, the Commission's 1989 declaratory order —the court of appeals held that summary judgment should be entered for respondents.

FPL argues that "[t]he court of appeals relied on the Commission's post-1965 actions [only] as aids to *inter-*

pretation of [the 1965 Order], not as freestanding grants of retroactive antitrust immunity." FPL Opp. at 8 (emphasis in original). But that view cannot be reconciled with the court of appeals' holding that "[e]ven if it was not clearly intended in the original agreements to include Brevard County [in the 1965 allocation], . . . the way the parties and particularly the Commission have conducted themselves since that time indicates that Brevard County has been allocated to FPL's service area." 64 F.3d at 613, App. 8a. Although the Eleventh Circuit clearly deferred to the Commission's post-litigation "interpretation" of its 1965 Order, it is equally clear that the court considered it immaterial whether the Commission had in fact approved the anticompetitive conduct *in 1965*.[1] For the Eleventh Circuit, it was sufficient that the Commission somewhere down the road—even after this litigation had commenced—expressed approval of re-

---

[1] Respondents' (and the court of appeals') reliance upon the rule requiring deference to an agency's interpretation of its own regulations, *see* FPC Opp. at 5, is misplaced. Courts defer to agency interpretations of their own rules on one of two grounds. Where the interpretation is contemporaneous with the rule it interprets, it can be presumed reliably to reflect the drafters' intent. *See, e.g., Udall* v. *Tallman*, 380 U.S. 1, 4, 16-17 (1965). Where the interpretation post-dates the rule, it may still be considered authoritative on the rationale that the agency is entitled to exercise its delegated policymaking authority by way of interpretive amendments. *See, e.g., Stinson* v. *United States*, 113 S. Ct. 1913, 1918-20 (1993). In the context of this case, neither rationale applies. The Commission's 1989 "interpretation" of its 1965 Order is obviously not contemporaneous and so is not a reliable indication of the 1965 Commission's intent. And, although the Commission indisputably has the policymaking authority to confer immunity prospectively through "interpretive" amendments or otherwise, it is petitioner's contention that the Sherman Act does not permit States to make such policy retroactively. *Accord Columbia Steel Casting*, 60 F.3d at 1398 n.7 (utility commission's 1992 declaratory statement "clarifying" the commission's intent in a 1972 order was irrelevant to the question whether the 1972 order conferred state-action immunity on private parties). Accordingly, *Udall* and *Stinson* have no bearing on this case.

spondents' decades-old and anticompetitive territorial pact. Accordingly, the decision below squarely rests upon a retroactive conferral of state-action immunity and cleanly presents the legal question framed by the petition.

2. Respondents' effort to harmonize the Eleventh Circuit's ruling with the Ninth Circuit's decision in *Columbia Steel Casting* fails for the same reason as their attempt to recast the opinion below. FPL suggests that the two cases are not in conflict because *Columbia Steel Casting* involved a retroactive "amendment" of an earlier state order (which the Ninth Circuit held was ineffective to confer state-action immunity), whereas this case involves only a subsequent agency "interpretation" of its earlier order. *See* FPL Opp. at 10. But there is clearly no substance to that distinction.

In *Columbia Steel Casting*, as in this case, the state utilities commission issued a declaratory statement after the commencement of antitrust litigation that purported merely to "clarify"—*not* to alter—its original order approving service territories.[2] The Ninth Circuit, however, squarely held that "the clarifications made by the PUC *after* the anticompetitive conduct at issue in this case" were irrelevant to the controlling legal question—namely, "whether the anticompetitive actions were authorized when undertaken." *Columbia Steel Casting*, 60 F.3d at 1398 n.7 (emphasis in original). Thus, the Ninth Circuit characterized the agency's post-litigation declaratory statement as a "retroactive amendment" of its original order, whereas the Eleventh Circuit in this case styled the Florida Commission's post-litigation declaratory statement as an

---

[2] As the Ninth Circuit recounted the agency's action:

> "[I]n April, 1992, the [Oregon Public Utilities Commission] issued its ruling on PGE's application for a declaratory order, stating that while 'perhaps [the 1972 Order] did not unambiguously allocate exclusive service territories to PGE and PP & L,' it was PUC's intent to approve such an allocation."

Columbia Steel Casting, 60 F.3d at 1394.

"interpretation" of its 1965 Order. But that different phraseology cannot obscure that both state agencies were attempting to accomplish precisely the same result through their post-litigation declaratory statements and that the Ninth Circuit held one to be legally ineffective while the Eleventh Circuit found the other to be legally controlling.

FPC takes a somewhat different tack. It frankly acknowledges that the Eleventh Circuit (in what FPC mischaracterizes as an "alternative holding") found immunity based on the Commission's "subsequent interpretation *and implementation* of its 1965 order." FPC Opp. at 4 (emphasis added). FPC, however, attempts to harmonize that holding with *Columbia Steel Casting* by arguing that the Ninth Circuit similarly upheld state-action immunity based upon subsequent agency action providing an " 'authoritative clarification' " of an earlier state order approving a private territorial pact. *Id.* (quoting *Columbia Steel Casting*, 60 F.3d at 1398). But FPC omits from its discussion the Ninth Circuit's crucial qualification that distinguishes the two cases and that places the two circuits squarely in conflict. In finding that a 1974 agency order provided an "authoritative clarification" of the agency's intention to approve exclusive service territories in 1972, the Ninth Circuit made expressly clear that the subsequent agency action was relevant only because it was *"issued before the acts that gave rise to this lawsuit."* 60 F.3d at 1398 (emphasis added).[3] To avoid any ambiguity, the Ninth Circuit added a footnote at the end of that qualifying clause in which it emphasized that state-action immunity could not be based

> "on the clarification made by the [state agency] *after* the anticompetitive conduct at issue in this case . . . .

---

[2] Thus, the full sentence from which FPC extracts its fragmentary quotation reads: "This official statement [the 1974 agency order], issued before the acts that gave rise to this lawsuit, is an authoritative clarification of [agency] intention." 60 F.3d at 1398 (footnotes omitted).

> The question is whether the anticompetitive actions were authorized when undertaken . . . ."

60 F.3d at 1398 n.7 (emphasis in original).

In this case, petitioner received its first electric bill reflecting noncompetitive rates in 1965, but the Eleventh Circuit found state-action immunity based on post-1965 expressions of state approval, particularly the Commission's 1989 declaratory statement issued after this lawsuit had been filed. The conflict between the circuits thus could not be clearer: the Ninth Circuit expressly held that agency approval that post-dates private anticompetitive conduct is ineffective to confer immunity, while the Eleventh Circuit held that such *post-hoc* expressions of approval compelled a finding of immunity.[4]

3. Finally, FPL suggests that certiorari should be denied because there exists an alternative ground for affirming the judgment below. Specifically, FPL argues that petitioner cannot show "antitrust injury" because Florida law assertedly would not permit FPC to sell electric power to petitioner even if respondents' private territorial agreement were illegal under the Sherman Act. *See* FPL Opp. at 12-13. FPL's characterization of state law, however, is untenable.

First, FPL's contention that "Florida's regulatory policy prohibits retail competition between utilities irrespective of any territorial agreement," FPL Opp at 12, is refuted by the district court's finding, affirmed by the court of appeals, that "Florida's policy of non-competition" among utilities applies only where the Commission has approved a valid division of territories:

---

[4] The existence of "intra-circuit tension" on this question within the Ninth Circuit, *see* FPL Opp. at 12 n.5, underscores petitioner's contention that the persistence of two competing models of the state action doctrine has resulted in confusion and muddled decisionmaking in the courts of appeals. *See* Pet. 11-19. The conflict which petitioner asks this Court to resolve, however, is *inter*-circuit.

> "Florida, through its legislation, regulation, and judicial holdings and pronouncements, has demonstrated its intent to displace competition in the field of retail electric service *with a regulatory mechanism to designate territorial boundaries.*"

App. 20a (emphasis added). "Under Florida's policy of non-competition, the validity of a territorial agreement is premised upon Commission approval." *Id.; see also* 64 F.3d at 612, App. 5a. Thus, as both the district court and court of appeals found, if an electric utility denies service in the absence of an approved territorial agreement, that anticompetitive act is *contrary* to Florida's regulatory policy and not entitled to state-action immunity. *See* App. 20a-21a; 64 F.3d at 612, App. 5a.

Second, the lower courts' understanding of Florida's regulatory policy is confirmed by the Florida Public Service Commission's 1989 declaratory order. There, the Commission declared that FPL was justified in refusing to "wheel" FPC-generated power to petitioner solely because the Commission approved of the utilities' territorial allocation of Brevard County to FPL. *See* App. 46a, 53a.[5] The Commission nowhere suggested, as FPL now claims, that FPC would be required to deny service to petitioner "irrespective of any territorial agreement."

Finally, because neither the district court nor the court of appeals addressed respondents' "injury" argument, this Court properly may leave that question to the lower courts in the event that it finds the Eleventh Circuit's analysis to be in error. *See Wilson* v. *Arkansas*, 115 S. Ct. 1914,

---

[5] The Commission thus explained that its holding turned on the existence of a valid territorial agreement:

> "We determine that pursuant to the applicable Florida statutes and case law, FPL is not required to wheel the power as requested by Union Carbide *when such wheeling contravenes the territorial agreement in effect between FPL and FPC, which has been approved by this Commission.*"

App. 46a (emphasis added).

1919 n.4 (1995); *Stinson* v. *United States*, 113 S. Ct. 1913, 1920 (1993). Accordingly, FPL's meritless contentions concerning Florida's regulatory policy provide no reason to deny review of the important federal question presented by the clear holding of the court of appeals in this case.

CONCLUSION

For these reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

CARTER G. PHILLIPS
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 736-8000

NATHAN P. EIMER
CONSTANTINE L. TRELA, JR.*
DAVID D. MEYER
SIDLEY & AUSTIN
One First National Plaza
Chicago, Illinois 60603
(312) 853-7000

Counsel for Petitioner

April 22, 1996

* Counsel of Record